THE CENTRAL LAW JOURNAL

SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, AUGUST 13, 1875. { Hon. JOHN F. DILLON, Contributing Editor.

A KANSAS DIVORCE CASE.—In the case of Brandon v. Brandon, 14 Am. Law Reg. (N. S.) 449, the Supreme Court of Kansas has rendered a decision before which the celebrated judgment of Chief Justice McKean of Utah, in the Ann Eliza Young divorce case, must pale its ineffectual fires. The court below granted a divorce to the husband, on his petition, on account of the habitual drunkenness of the wife, and at the same time gave the wife custody of the minor children—and also the homestead for life—and also all the household and kitchen property except two beds—and also twenty-five dollars a month as alimony—and also the costs, amounting to more than two hundred dollars! If this judgment should ripen into a precedent, a discontented wife in Kansas will need do no more then substitute a jug of whiskey in the place of her liege lord, and stay by it perseveringly and affectionately, in order to get a divorce at the cost of the aforesaid liege, and on the most favorable terms. It is, however, but just to the Supreme Court of Kansas to say, that the evidence upon which this remarkable decree was based not being in the record, they felt obliged—violent as the presumption must have been—to presume that the court below exercised its discretion properly under the proofs adduced.

TWO KINDS OF LAW.—We commented last week upon the fact, that the rise of the court of chancery, in England, created for a time two opposing kinds of law, administered by two opposing tribunals. We now have occasion to chronicle the fact that the existence of a separate court of admiralty, produces, in one respect, at least, the same result. In McCord v. the steamboat Tiber, in admiralty, in the United States District Court for the Western District of Wisconsin (7 Chicago Legal News, 363), Mr. District Judge Hopkins, has decided, on the authority of Atlee v. Northwestern Packet Co. (2 CENT. L. J. 254), that the common law doctrine of contributory negligence is not applicable in the admiralty courts, which, in this respect, follow the rule of the civil law. This doctrine may be sound, but it is obvious that there is no sense in having, in the same country, one kind of law for navigable rivers, and another kind of law for railroads, in respect of injuries arising out of negligence. The civil law rule in this respect is unsound and pernicious, in that it licenses and gives immunity to negligence. Any rule variant from the rule of the common law, that he who comes into a court of justice, seeking relief must come with clean hands, is against the highest policy, and should be discountenanced. If the admiralty courts can not see a way to make the law of admiralty uniform with the *law of the land*, in a particular as important as this, the national legislature should promptly apply a remedy.

SENSIBLE ADVICE TO YOUNG LAWYERS.—The advice which, according to the Louisville Courier-Journal, Judge Underwood of Rome, Georgia, gave to four young lawyers, who had passed an examination in his court, is quite as good and much more pointed than young lawyers generally get on such occasions:

Young gentlemen, I want to say a thing or two to you. You have passed as good an examination as usual, perhaps better, but you don't know anything. Like those young fellows just back from their graduation college, you think you know a great deal. That is a great mistake. If you ever get to be of any account you will be surprised at your present ignorance. Don't be too big for your breeches. Go round to the justices' court. Try to learn something. Don't be afraid. Set off upon a high key. You will no doubt speak a great deal of nonsense, but you will have one consolation; nobody will know it. The great mass of mankind take sound for sense. Never mind about your case—pitch in. You are about as apt to win as to lose. Don't be ashamed of the wise-looking justice. He don't know a thing. He is a dead-beat on knowledge. Stand to your rack, fodder or no fodder, and you will see daylight after awhile. The community generally supposes that you will be rascals. There is no absolute necessity that you should. You may be smart without being tricky. Lawyers ought to be gentlemen. Some of them don't come up to the standard and are a disgrace to the fraternity. They know more than any other race generally, and not much in particular. They don't know anything about sand stones, carboniferous periods, and ancient land-animals known as fossils. Men that make out they know a great deal on these subjects, don't know much. They are humbugs—superb humbugs. They are ancient land-animals themselves, and will ultimately be fossils. You are dismissed with the sincere hope of the court that you will not make asses of yourselves.

A NEW POINT IN INTERNATIONAL LAW.—Senor Ignacio Mariscal, Envoy Extraordinary and Minister Plenipotentiary to the United States from the Republic of Mexico, has preferred a claim to the assignee of Duncan, Sherman & Co., which involves an apparently new point in international law. When he came to this country he brought with him a large amount of Spanish gold. This he disposed of for American gold, which he deposited with Messrs. Duncan, Sherman & Co., opening a currency account with them. Now that they have suspended payment and gone into liquidation, a demand has been made upon Judge Shipman, their assignee, by Field & Deyo, attorneys for Senor Mariscal, in which they say:

He considers that this gold is protected by the same immunity which protects his person, his servants and his other property, by reason of his being a diplomatic representative accredited to the government of the United States. He considers it his right as well as his duty to defend this immunity, and to use all the means afforded him by the law of nations, and, so far as may be proper, by the laws of this country, to recover this property from any person who may retain it against his will. He requests its immediate return to him, and protests against any other disposition of it on your part.

The reply of Judge Shipman is couched in language similar to that in which "Z. Taylor" responded to Santa Anna's demand for the surrender of his army, on the field of Buena Vista: "I respectfully decline to comply with the request." Senor Mariscal has not brought suit, relying, no doubt, upon the influence of diplomacy; but Senor Juan N. Navarro, the Mexican Consul-General, who had with the firm about $17,000, most of which was the property of his government, has commenced an action in the United States Circuit Court. He claims that the funds to his credit with the firm, constituted a "special" deposit, and consequently are priviledged.

—A BILL amounting to $1,502.75, for meals furnished to the jury in the case of Tilton against Beecher, is now before King's County, Auditor Fitzgerald, in Brooklyn. The meals supplied when the jurors went to the restaurant in person, are charged at an average price of 69 6-10 cents each. Those served in the jury room while the jurors were locked up, were charged at the rate of $1.27 for each juror per day. The total number of meals furnished was 1,915. The Auditor will report the bill favorably to the board of supervisors under an act of the legislature of May 14, 1875, providing for jurors' meals, and extra compensation during protracted trials.—[*New York Tribune*.

Liability for Words spoken on the Witness Stand —The Rule in Dawkins v. Lord Rokeby.

[Concluded from last week.]

The American cases for the most part declare the English rule, but do not support it with the strength and uniformity which characterize the English decisions.

In Bostwick v. Lewis, 2 Day (Conn.), 447, it was held that no action will lie for suborning a witness to swear falsely in a former cause, whereby a judgment was obtained against the present plaintiff contrary to the truth and justice of the case.

An effort was subsequently made by Smith, one of the defendants in the former Connecticut suit, to litigate the same question over again in New York (Smith v. Lewis, 3 Johns. 157), but with a like result. Kent, Ch. J., placed his judgment mainly on the ground that it was substantially an attempt to litigate again in New York a matter which had been finally litigated in Connecticut.

In Barnes v. McCrate, 32 Maine, 442, decided in 1851, there had been a proceeding in the United States District Court for the purpose of ascertaining the costs in a case of seizure of goods by an United States collector of customs. The defendant, called by the collector as a witness, had testified that he had charged the collector $35.50 for storing the goods in his store; that it was a fair charge under the circumstances, but would be a large one in common and ordinary cases. He was then asked by the court, or by the counsel, to give his reasons why *in this case* and *under the circumstances*, more was charged than in common and ordinary cases; and he answered: "The Messrs. Clark would not store the goods for fear that Barnes would set their property on fire, and I did not wish to store them because he might set my buildings on fire again. * * * He set my building, the custom-house, on fire, and he has set fire to two other buildings, and I can prove it." The allegations of the declaration are not described in the report of the case. A non-suit was entered, after hearing the testimony, and this judgment was by the court in banc affirmed. Tenney, J., who delivered the opinion, orally said: "There can be no question that if a witness, taking advantage of his position, and departing from what rightfully pertains to the case, should voluntarily slander one of the parties, he would be liable. But when called upon in the progress of a cause and under the rules of the court, and confining himself to that which rightfully pertains to the case, he is not liable for the testimony he may give. To hold otherwise would tend to intimidate a witness, and to deter him from the disclosure of the whole truth. He might have no means to prove his statements. He may have been robbed while alone. Should he testify to the fact in course of a regular trial of the offender, he would not be liable for his statement. This is a doctrine of the highest policy."

In the earlier case of Dunlap v. Glidden, 31 Maine, 435, it was distinctly ruled by the same court that an action will not lie against a witness for giving false testimony in another suit.

The same point was adjudged in 1846 in Vermont, in the case of Cunningham v. Brown, 18 Vt. 123, where a declaration alleging that the defendant in another suit in which the present plaintiff was defendant, had sworn to "a certain false, fraudulent and fictitious deposition," which was material to the issue, * * *knowing it to be false*, and for *the purpose of cheating and defrauding the plaintiff*, and that the court trying the said case was thereby deceived and misled, and that by force of said deposition alone, judgment was rendered in favor of the plaintiffs in that case, * * whereby the plaintiff [in this case] suffered damage,"—was held bad on demurrer. "It is evident," said Redfield, J., delivering the opinion, "that the action cannot be maintained without virtually putting it in the power of every suitor to re-examine every suit in which he is cast, and to try the witnesses for perjury, by instituting against them a civil suit."

In Calkins v Sumner, 13 Wis. 193, the defendant was sued for a libel in stating in testimony given before arbitrators, before whom he had been subpœnaed to give evidence, that he had heard the plaintiff swear to a lie. The circuit judge charged the jury: "If the evidence was given maliciously, no matter how pertinent to the issue, it is slander." "The rule," said Dixon, Ch. J., in delivering the opinion of the supreme court, "is exactly the other way. * * The rule is, that if what is said or written be pertinent and material to the cause or subject-matter of enquiry, the speaker or writer is not liable to an action, however much he may be actuated by hatred or ill-will. In such cases there can be no doubt that much may be said and done, which is very detrimental to the object of it, but it is one of the many instances which must be considered a loss without an injury, and where the claims of justice must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible." * * * "I think," continued the learned judge; "that the correct rule in regard to a witness' liability to an action for what he may say pending his examination before a judicial tribunal, is that he is not answerable in damages for any statements he may make, which are responsive to questions put to him, and which are not objected to and ruled out by the court, or concerning the impertinency or impropriety of which he receives no advice from the court or tribunal before which the proceeding is had. It seems to me that he may rest safely upon the mere silence of the court, and those instructed in the subject under examination. We all know that a great majority of persons called upon to testify in our courts of justice are wholly ignorant of the rules of evidence by which legal proceedings are governed; and that if they were not, they are, in most instances unacquainted with the true nature the controversy, and the exact legal condition of the issue between the parties, so that they could not determine for themselves the materiality or pertinency of their answers to particular questions propounded. Besides, it is not for them to decide such questions. The law has imposed that duty upon courts and others having authority to hear and determine disputed questions of law and fact. Witnesses do and must rely on the conduct of courts and counsel engaged, and in the absence of objection or warning, ought to be permitted, without fear of harm or molestation, to make truthful and direct responses to all questions which may be put to them. They may be compelled to attend and give evidence, and, when duly notified, the law makes it their unavoidable duty to do so; and to make them responsible in damages, and, as it were, criminally, for such an obedience to a

legal requirement, would be most a wicked and intolerable outrage."

Similar views as to the question whether a witness must, at his peril, decide upon the materiality of the questions propounded to him, were expressed by Tenney, J., in Barnes v. Crate, *supra*. "A witness," said he, "is not supposed to know the exact line of proceeding. He is therefore under the direction of the court. * * * If the question was put by the court, there can be no liability for answering it; if put by the plaintiff's counsel, the plaintiff can have no ground of complaint that it was answered; if put by the defendant's counsel, objection should have been made, and, if improper, it would have been excluded."

In Osborne v. Forshee, 22 Mich. 209, the plaintiff was permitted to show, under objection, that on a trial before one Justice Palmer, the defendant, while being examined as a witness, testified, in answer to a specific question, that he had told the plaintiff that he had sworn to a lie, and that he could prove it by Bunce's docket. This was held improper. Graves, J., delivering the opining of the court, said: "While the defendant, in his character of witness in the case referred to, was requested to testify to his former declarations to Forshee, [the plaintiff] he was, for that case, the mouth-piece of the facts which the law required him to disclose, and not the voluntary repeater of his former sayings; and his statements thus obtained respecting the declarations he had before made to Forshee, can not be turned into admissions to substantiate the allegations of slander in the declaration."

Two cases have been decided, each in a court of high character, which announce a doctrine contrary to that declared in the foregoing English and American cases.

In Smith v. Howard, 28 Iowa, 57, the defendant made a criminal accusation against the plaintiff before a justice of the peace, of stealing a calf; and the plaintiff thereafter brought an action against him,—1. For the possession of the calf; 2. For malicious prosecution; 3. For slanderous words spoken [as a witness] in relation to such alleged larceny. On the last ground the court, by Wright, J., declared the true rule to be, that what was said pertinent and material to the matter in controversy being privileged, the legal idea of malice is excluded; but if not pertinent, and not uttered *bona fide*, but for the purpose of defaming the plaintiff, protection can not be claimed, and defendant would be answerable." When it is considered that the court quote as sustaining the position, Howard v. Thompson, 21 Wend. 320, and Mayo v. Sample, 18 Iowa, 306, both of which were defended on the ground that the language assigned was communicated by an *officer* in his official capacity, and hence privileged, and when it is also stated that the authorities bearing on the question of the liability of a *witness* for words spoken in a court of justice, were not considered at all, this case may, perhaps, be passed by, without disrespect to the court, as having been erroneously decided. In the other case—White v. Carroll, 42 N. Y. 161,—the defendant, a witness, on being asked if a certain person was attended by a physician, answered, "Not as I know of; I understood he had a quack; I would not call him a physician. I understood that Dr. White, as he is called, had been there." Dr. White was an educated physician, but pursued the homeopathic system of practice. The case was submitted to the jury to find, as a fact, whether at the time of offering this testimony, the defendant believed it to be pertinent to the issue, and instructed them that if they believed, from all the circumstances proved, that the defendant testified in good faith, and in the belief that his answers were pertinent and relevant, then the law protected him in what he said; it was privileged, and their verdict should be for the defendant; that if, on the contrary, they should believe from this evidence that the defendant, though testifying at this time as a witness, and as such entitled to the protection of the law in so using the words proved, was actuated by malice; that he used the words for the mere purpose of defaming the plaintiff, then the law withdrew the protection it would otherwise have afforded him, and he became amenable to the consequences of uttering the slander or of publishing the libel. These instructions were held free from error, and it was declared, in the opinion of the court by Sutherland, J., that the question, whether the defendant did, or did not, maliciously answer the questions put to him as a witness, was "most emphatically a question for the jury." This case and the Iowa case appear to be the only authorities supporting the view that a person is liable for words spoken maliciously on the witness stand.

As shown by some of the decisions already quoted, the protection extends to *affidavits* made in the progress of a judicial proceeding, *provided they are material and relevant to the issue;* and in such cases materiality and relevancy are said to be the tests by which the question whether an action lies is determined. Garr v. Selden, 4 N. Y. 91, reversing 6 Barb. 416; Warner v. Paine, 2 Sandf. 195; Marsh v. Ellsworth, 1 Sweeney (N. Y. Superior Court), 52.

Thus in Garr v. Selden, *supra*, where in a suit by an attorney for his fees, the defendant had presented an affidavit charging the plaintiff with disclosing confidential communications, it was held—the affidavit being material to the determination of a pending motion,—that it was privileged. "If," said the court (Hurlbut, J.), "the matter of the affidavit were pertinent or material to the motion, the law will not allow its truth or innocency to be drawn in question in an action for libel."

So in Warner v. Paine, *supra*, where in an affidavit to oppose a motion, the defendant alleged that the plaintiff had been guilty of perjury in an affidavit in support of the motion, this allegation being material, it was held that no action would lie for a libel.

So, in an English case not hitherto noticed, it was held that in an affidavit in answer to an application of the plaintiff for a criminal information against the defendant for sending a challenge, the defendant was justified in stating any matters, however defamatory and otherwise libellous, to prevent the court making the rule absolute, and that no action could be sustained for anything contained in such an affidavit. Doyle v. O'Doherty, 1 Carr. & M. 418.

So in Tennessee, a statement made in a return to a writ of *habeas corpus*, containing matter which might have been otherwise defematory, was held no ground of an action for libel. Lea v. White, 4 Sneed, 111. "The question is presented in the case before us," said Harris, J., in delivering the opinion of the court, "Was there probable cause? or, in other other words, could the defendant have reasonably supposed it necessary to his defence to return, on the writ of *habeas cor-*

pus, the alleged libellous matter. We think that he might have reasonably supposed that the statement would exert an influence on the mind of the court; and this being so, he had a right to introduce it and rely on it for his defence. And having this right, he is, under the law, absolutely privileged, though he may also have been actuated by motives vindictive and malicious."

But in Marsh v. Ellsworth, *supra*, words contained in exceptions to a bankrupt's discharge, which alleged that the plaintiff had induced the bankrupt to testify falsely, with reference to certain material facts, were held on demurrer to constitute a good cause of action, the complaint alleging that they were wholly immaterial; and this case goes so far as to hold that in an action of this kind the burden is upon the defendant for the *materiality* of the words spoken or written, and that if such words are defamatory in their terms, it will not be presumed that they were material, but that this must be clearly proved.

The list of cases illustrative of the question could be still further extended. If, however, the reader desires to pursue the subject further, so that his enquiries shall embrace the analogous cases of defamatory matter contained in *pleadings*, in the *arguments of counsel*, and the like, he will find the cases collected in Mr. Townshend's work on Slander and Libel, 2d edition, §§ 220, *et seq.**

In conclusion, we think the American rule may fairly be said to be—

1. That defamatory words used by witnesses in the course of judicial proceedings, if material and relevant to the subject of the enquiry, cannot be made the ground of a civil action.

2. That the same protection extends to affidavits made in the course of judicial proceedings.

3. That in case of words spoken on the witness stand, their materiality or relevancy will not be subjected to a strict test; but if the words were responsive to questions put to the witness and not objected to, he will be protected.

4. But that in case of defamatory matter contained in written affidavits submitted by parties to judicial proceedings, a stricter test as to materiality and pertinency will be applied.

*The law of France was, and, it is presumed, is, the same as ours with reference to such actions. Code de la Presse, Ch. 6, Art. 23. It seems, however, that the Athenians allowed an action in favor of an injured party against a witness who had testified falsely in a court of justice. Smith, Dict. Greek & Rom. Antiq. 734.

Life Insurance—Disposition of Policy by Will.

FANNIE C. WILLIAMS v. ELEANOR N. CORSON *ET AL.**

In the Chancery Court of Nashville, Tenn.

Before Hon. WM. F. COOPER, Chancellor.

1. **Power of Husband to dispose of Life Insurance Policy by Will.**—A husband who has taken out a policy of insurance on his own life, payable in the usual form to him, his executors, administrators and assigns, may dispose of the same by will.

2. **Effect of Statutes Exempting against Debts.**—The provisions of the code 2,294 and 2,478, directing that such a policy shall survive to the benefit of the widow and children, and shall not be subject to the debts of the husband, only apply when the policy remains undisposed of by the husband in his life-time.

Opinion by Mr. Chancellor COOPER.

H. O. Williams died in the year 1871, having first made a valid nuncupative will by which he bequeathed his personalty, and especially the surplus proceeds of a policy of insurance on his own life, to his widow, the defendant, Eleanor N., now the wife of defendant, H. C. Corson. This policy was made payable, on his death, to his executors, administrators and assigns. Being in debt the decedent had, in his life-time, transferred a part of this policy to secure his creditors, leaving a residue of the sum assured of about $2,400. This amount the widow has collected and claims under the nuncupative law. The complainant is an only child of the decedent by a former wife, and has filed this bill by next friend, claiming a share of the funds received from the policy, under the Code, sections 2294 and 2478. It is agreed that the demurrer of the defendants to the bill raises the question whether the proceeds of such a policy can be bequeathed by will, or must pass under the statute, and argument has been made accordingly.

Section 2294 of the Code reads thus: "A life insurance effected by a husband on his own life shall enure to to the benefit of the widow and next of kin, to be distributed as personal property, free from the claims of creditors."

Section 2478 is: "Any life insurance effected by a husband on his own life, shall, in case of his death, enure to the benefit of his wife and children; and the money thence arising shall be divided between them according to the law of distributions, without being in any manner subject to the debts of the husband, whether by attachment, execution or otherwise."

Both of these sections are taken from the act of 1846, ch. 216, § 3, which was construed by the supreme court of this state, in Rison v. Wilkerson, 3 Sneed, 565. The language of that act was: "That any husband may effect a life insurance on his own life, and the same shall in all cases enure to the benefit of his widow and heirs, in the present rates of distribution, without being in any manner subject to the debts of said husband, whether by attachment, execution, or otherwise." The act is a little stronger in its phraseology than the code in using the words "in all cases" in connection with the operative clause, "shall in all cases enure to the benefit" of the widow and heirs. But in substance the provisions are the same.

The statement of the case as made by the learned judge who delivered the opinion in Rison v. Wilkerson, shows that the policy in that case was, like the policy in this case, in the ordinary form, taken out by the husband, and by him assigned, with the assent of the company, as collateral security for a debt of the husband. It is manifestly an inadvertency on the part of the reporter, when he says in the preliminary statement of facts, that the insurance was effected by way of indemnity to the husband's creditors. The bill was filed by the widow and children against the creditors, claiming the whole amount of the insurance under the act of 1846, precisely upon one of the grounds assumed in argument in this case, that the statute was plain and positive that the policy should in all cases enure to the benefit of the widow and children, and should not be subject, in any manner, to the claims of creditors. The contest was between the widow and children on the one side—parties expressly preferred by the act, and creditors on the other—parties expressly excluded by the act. It was, therefore, a stronger case than the one before the court, whether the contest is between the widow and child, both of the preferred class.

"It is contended," says the court, "that this act operates as a settlement upon the widow and children of the insured, and cannot be diverted from their use and benefit by any act of his, or his creditors." "Its phraseology," they add, "is very strong and forcible in favor of the rights of the widow in exclusion of the creditors. But it must have given to it a sensible construction. * * Surely it was not intended to divest the insured, while he lived, of the right of disposing of his own as he pleased, so as to bind those who might come after him and stand in his shoes. * * We think that nothing more is intended by the act, and that no other operation can be given to it, than to prevent a fund of this kind from passing into the hands of the administrator, with the other effects of the insured, in favor of the widow and children; or, in

*For our report of this case we are indebted to the Nashville Commercial and Legal Reporter.—[ED. C. L. J.

other words, to prefer them to creditors to that extent. But it can only apply where the claim remains undisposed of by the deceased. His power over it during life is not at all affected by the act, but continues as ample and unrestricted as before."

Language could not possibly be stronger or plainer. The act was not intended to prevent a husband, who takes out a policy on his own life in the ordinary form, from dealing with it, as with any other property he may acquire. It will only apply where the claim remains undisposed of by the deceased during his life. It is obvious that a disposition by will is as efficacious to dispose of a man's property as a disposition by assignment or deed. If his power during life is not affected by the act, but continues as ample as before, the power to bequeath remains as effective as the power to transfer by assignment.

Undoubtedly it is within the competency of the legislature to limit the power of disposition of property by will, for the benefit of the widow and children of the testator, or other persons. The civil law, as it exists in France and in Louisiana, does, for the benefit of the children, limit the power of the parent to give his property by will to third persons to a definite portion of the estate. And the testamentary power, it would seem, has been limited in this state in regard to property exempt by law from execution, at any rate where the estate is insolvent and the contest is between the widow and children and the creditors. Pride v. Watson, 7 Heisk. 232. If the estate be solvent, and the contest is with a legatee of the exempted articles, the question might be different, and certainly other principles controlling the rights of the parties would come into play. The legislation under consideration in this case has not, either in express terms or by fair implication, gone so far. It does not control the power of disposition at all, and only provides for the benefit of the widow and children to the exclusion of creditors, where the parent and father has not made in his life-time a valid disposition of his property. The power of disposition is one of those incidents of ownership which lies at the basis of modern civilization, and can, it seems to us, only be curtailed by the clearest expression of legislative intent.

But it is urged the assured can not dispose of the policy by will, for the reason that the will does not speak until the death of the testator, and in such event the statute steps in and makes the distribution, and hence the will must be held for naught. The answer is, that by the decision of Rison v. Wilkerson, the power of disposition during life is not affected by the act, and that this power may be effectually exercised even if the gift or grant, whether it be by deed or will, do not become practically operative until after death. It is the execution in life that gives validity to a will or deed, and the time when the donee goes into possession, or reaps the actual benefit, is a mere incident.

Nevertheless, the very point thus made by the learned counsel was elaborately argued and considered three centuries ago, in one of the celebrated causes of that day, a cause rendered still more memorable by the fact that it is supposed to have been the occasion of one of the colloquies of the Shakesperean drama. Plowden's reports were popular in their day, having been four times reprinted during the last quarter of the sixteenth century. They have been commended by our ablest American commentator for their authenticity and accuracy, and as "exceedingly interesting and instructive by the evidence they afford of the extensive learning, sound doctrine, and logical skill of the ancient English bar." Better authority, therefore, we could not find. In Hales v. Petit, Plow. 253, we have the diccussion referred to. Sir James Hales, one of the justices of the common pleas, a son of an eminent baron of the exchequer, was found by a coroner's jury to have wilfully gone in a river, "and himself therein feloniously and voluntarily drowned." Such an act was in those days, if not "rank burglary," at least felony without benefit of clergy, and not only deprived the guilty party of Christian burial, but occasioned a forfeiture of his goods and chattels to the crown. The suit was between an assignee claiming under the crown, and the widow of the deceased, and raised the question whether a joint lease to Justice Hales and his wife was forfeited to the crown, or survived to the widow. The argument turned upon the nice point whether the felony of the husband was consummate in his life time or only after his death. For in the first case it seemed to be conceded that the forfeiture would take effect, whereas in the latter case the result was much more doubtful. That a justice of the king's court should commit a felony in his life time, was an exceedingly grave matter, and that he should be able to commit a felony after his death was far graver.

Two able serjeants sought, on behalf of the widow, to satisfy the court that the felony was consummated after the death of the distinguished judge. The following is a specimen of the "sound doctrine and logical skill" of these members of the ancient English bar. They insisted that the "forfeiture shall only have relation to the time of the death, and the death precedes the forfeiture, for until the death is fully consummate he is not a *felo de se*, for if he had killed another, he should not have been a felon until the other had been dead. And for the same reason he can not be a *felo de se* until the death of himself be fully had and consummate. For, the death precedes the felony both in the one case and in the other, and the death precedes the forfeiture. But nevertheless the forfeiture comes at the same instant that he dies, yet in things of an instant there is priority of time in consideration of law, and the one shall be said to precede the other, although both shall be said to happen at one instant; for every instant contains the end of one time, and the commencement of another. And, accordingly, here the death and the forfeiture shall come together and at the same time, yet there is a priority; that is, the end of the life makes the commencement of the forfeiture, though at the same time, the forfeiture is so near to the death that there is no meantime between them, yet notwithstanding that, in consideration of law, the one precedes the other, but by no means has the forfeiture relation to any time in his life."

It required four learned serjeants on behalf of the assignee of the crown to meet this lucid argument. They insisted that the forfeiture should have relation to the act done in the life-time which was the cause of the death. And one of them said: "The act consists of three parts. The first is the imagination, which is a reflection or a meditation of the mind, whether or no it is convenient for him to destroy himself, and what way it can be done. The second is the resolution, which is a determination of the mind to destroy himself, and to do it in this or that particular way. The third is the perfection, which is the execution of what the mind has resolved to do. And this perfection consists of two parts, viz.: the beginning and the end. The beginning is the doing of the act which causes the death, and the end is the death, which is only a sequel to the act." And much more to the same purport.

The reasoning of the court is in the same learned and discriminating vein. For the Lord Dyer said: "That five things are to be considered in this case. First, the quality of the offense; secondly, to whom the offense is committed; thirdly, what shall he forfeit; fourthly, from what time the forfeiture shall commence, and, fifthly, if the term here shall be taken from the wife." And Sir Anthony Brown, J., said: "Sir James Hales was dead, and how came he to his death? It may be answered, by drowning. And who drowned him? Sir James Hales. And when did he drown him? In his life time. So that Sir James Hales, being alive, caused Sir James Hales to die, and the act of the living man was the death of the dead man."

The decision was in favor of the assignee of the crown, and upon the ground that the act of the living man was the effective cause of the felony, although the latter was only consummated upon the death. It is an authority directly in point on the question be-

fore us, and binding as a precedent, whatever may be said of the peculiar form in which its logic is presented.

The Elizabethan drama is full of legal allusions, showing that the business of the courts was brought home to the people in those days even more than in our own era. What wonder, then, that the great dramatist, in his marvelous range of vision, should see this specimen of legal acumen, and serve it up for the amusement of the groundlings, and as a foil to the tragic end of the gentle Ophelia.

In Sir James Hales' case, the coroner sat on him and found it felony. In Ophelia's case, the "crowner" sat on her and found it Christian burial. In the first case, the learned counsel says, that the act consists of three parts, the imagination, the resolution, and the perfection. "If I drown myself willingly," says the clown, "it argues an act; and an act hath three branches; it is to act, to do, and to perform." The learned court discusses its case upon the supposition that the man went to the water. The clown concedes that "If the man go to the water and drown himself, it is, will he nill he, he goes." "But," he adds, "if the water comes to him, he drowns not himself. Argal, he that is not guilty of his own death, shortens not his own life." "But is this law?" queries his fellow-clown. "Aye, marry, is't; crowner's quest law."

NOTE.—Although this case *annotates itself*, we are tempted to add to the authorities collected by the learned chancellor, the following: "For where a testament is, there must also of necessity be the death of the testator.

"For a testament is of force after men are dead; otherwise it is of no strength at all while the testator liveth."

St. Paul. Heb. IX, 16 and 17.

Insanity as a Defence to a Negotiable Note—Hearsay Evidence of Insanity.

THE LANCASTER COUNTY NATIONAL BANK v. MOORE.*

Supreme Court of Pennsylvania, May 24, 1875.

1. **Insanity, when not a Defence to Commercial Paper** —Where a bank discounts the note of a lunatic, before proceedings had to adjudge the lunacy, without any notice of lunacy, and without any fraud in the transaction (the alleged lunatic being present when the note was offered for discount), and there having been nothing in his manner or conversation to put the officers of the bank on their guard as to his mental condition; the contract is on the part of the bank *executed*, and the fact of lunacy, even if it existed, is no defence. This decision is, however, on the facts of the particular case; and what would be the effect of a pending inquisition of lunacy, or what the rule would be in case of an instrument under seal, or conveyance of land, *not decided*.

2. **Hearsay Evidence of Insanity.**—Reports of defendant's insanity in the neighborhood, not brought home to the bank, is only hearsay evidence and inadmissible.

Error to the Common Pleas of Lancaster County. The case is stated in middle of the opinion.

Nauman and *Reynolds*, for plaintiff; *H. M. North* and *T. E. Franklin*, for defendant.

PAXSON, J., delivered the opinion of the court.

The law is well settled that persons who are not *sui juris*, and have no general capacity to contract debts, are nevertheless liable for their torts, and may bind themselves for necessaries. Such rule rests upon principles of sound public policy. To deny the latter branch of the proposition, might in some instances deprive persons laboring under such disabilities, of the means of subsistence. In La Rue v. Gilkyson, 4 Barr, 375, it was held that the executor of a lunatic was liable for necessaries furnished to his testator while *non compos mentis*, and before the appointment of a committee. In this case the articles furnished came within the most rigid rule as applied to necessaries, such as board, washing, etc., but Chief Justice Gibson, who delivered the opinion of the court, cites approvingly Baxter v. Roustmouth, 2 C. & P. 178, in which it was held that the word "necessaries" (furnished to a lunatic), "is not to be restricted to articles of the first necessity, but that it includes everything proper for a person's condition; and that to hire carriages for a nobleman who, though actually insane, voted in Parliament, and went about as other men do, carries with it no mark of imposition." And it was also strongly intimated that such a man would even be liable for merchandise innocently furnished to his order under such circumstances. It is true the latter point was not before the court, and the expression referred to is but *dictum*, but the mere *dictum* of so eminent a jurist as the late Chief Justice Gibson, is entitled to respect. La Rue v. Gilkyson was followed by Beals v. See, 10 Barr, 56, in which it was held that an executed contract by a merchant for the purchase of goods before the day from which the inquest found him to have been *non compos*, could not be avoided by proof of insanity at the time of the purchase, unless there had been a fraud committed on him by the vendor, or he had knowledge of his condition. There was proof in the case cited that the goods purchased were unsuited to the object for which they were purchased; that the price agreed upon far exceeded their market value; and that plaintiff had tendered them back to the defendants, who declined receiving them, whereupon they were sold at auction, after notice. Says Gibson, C. J.: "Should he have made a wild and unthrifty purchase from a stranger unapprised of his infirmity, who is to bear the loss incurred by one of the parties to it? Not the vendor, who did nothing that any other man would not have done. As an insane man is civilly liable for his torts, he is liable to bear the consequences of his infirmity, as he is liable to bear his misfortunes, on the principle that when a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it. A merchant, like any other man, may be mad without showing it, and when such a man goes into the market, make strange purchases, and anticipates extravagant profits, what are those who deal with him to think? To treat him as a madman would exclude every speculator from the transactions of commerce." It will be observed in this case that the goods were purchased two days prior to the day from which the inquest found the purchaser insane, and the transaction was not therefore covered by the finding. But the court do not rest their decision upon this ground, but treat it as the purchase of an insane man—insane at the time of the purchase. Such was evidently the view taken of the case in Nace v. Boyer, 6 Casey, 99, in which the late Chief Justice Woodward says: "In Beals v. See, 10 Barr 56, this court held that an executed contract by a merchant for the purchase of goods could not be avoided by proof of *insanity at the time of the purchase*, unless a fraud was committed on him by the vendor, or he had knowledge of his condition. The principles decided in La Rue v. Gilkyson, and Beals v. See, are recognized in State Bank v. McCoy, 69 Penn. St., 204.

We will apply these rules to the facts of this case. George H. Moore, the defendant and alleged lunatic, resided in Lancaster county, about six miles from Lancaster city, where the plaintiff's corporation is located. He was a man of some property, was about fifty-four years of age, and to some extent, at least, had managed his own pecuniary affairs. There was not a scintilla of proof that the bank had any knowledge of his mental imbecility. On December 30, 1871, he called at plaintiff's bank in company with B. M. Stauffer, a resident of Mount Joy, Lancaster county, for the purpose of obtaining a discount, when two notes were drawn up, one for $225, and the other for $775, signed by the said George H. Moore, to the order of Stauffer, and by him endorsed. The two notes were both discounted, and the money placed to the credit of Moore and checked out by him. There is no allegation that the money thus obtained was used improvidently; in fact, the evidence tends to show that it was applied to the payment of his debts. Nor was there anything in his manner or conversation to put the officers of the bank on their guard as to his mental condition. On June 5, 1872, a petition *de lunatico inquirendo* was presented against George H. Moore, and after the usual proceedings an inquisition was returned on August 19th, 1872, finding that the said Moore was a lunatic, and has been so for about three

*Our report of this case should be credited to the Lancaster Bar.

years last past, and had no lucid intervals. This inquisition was traversed on October 25, 1872, by John M. Hershey, a creditor. Said traverse was pending at the time of the trial in the court below.

In Beals v. See, as before observed, the day when the goods were sold, was not covered by the finding of the inquest. Here the inquisition shows Moore to have been a lunatic at the time the note was made and discounted by the bank. The record of the proceedings in lunacy was admitted in evidence at the trial in the court below, and was undoubtedly *prima facie* evidence of Moore's insanity. But we are unable to see how this affects the case. Beals v. See was decided upon the express ground that the merchant was liable, notwithstanding his insanity, upon an executed parol contract in absence of fraud in the transaction, and of knowledge on the part of the vendor of his insanity. The most that this inquisition amounted to was to establish a *prima facie* case of insanity when this contract was made. But the broad principle decided in Beals v. See was, that the insanity when established was not, under the circumstances, a defence.

The soundness of this rule is too apparent to need any extended vindication. Insanity is one of the most mysterious diseases to which humanity is subject. It assumes such varied forms, and produces such opposite effects as frequently to baffle the ripest professional skill, and baffle the keenest observation. In some instances it affects the mind only in its relation to, or connection with a particular subject, leaving it sound and rational upon all other subjects. Many insane persons drive as thrifty a bargain as the keenest business man, without betraying in manner or conversation the faintest trace of mental derangement. It would be an unreasonable and unjust rule that such persons should be allowed to obtain the property of innocent parties, and retain both the property and its price. Here, the bank in good faith loaned the defendant the money on his note; the contract was executed so far as the consideration is concerned, and it would be alike derogatory to sound law and good morals that he should be allowed to retain it to swell the *corpus* of his estate.

It will be seen that the fact that the bank had no notice of the defendant's insanity is an important element in the case. The proceedings in lunacy were not commenced until after the note was discounted, and the plaintiffs were not even affected with constructive notice. We limit our decision in this case to its own facts, and do not decide the case of a contract made during proceedings in lunacy or after inquisition found. We leave the effect of *lis pendens* in such a case until the point is raised. Nor does this decision apply to conveyances of land, or other instruments under seal.

From what has been said it will be seen that the learned judge erred in his answer to the plaintiff's first point. Said point should have been affirmed in the terms in which it was presented.

There was also error in that portion of his charge referred to in the seventh assignment of error. The jury should have been instructed, that if there was no fraud in the transaction, and the bank had no notice of defendant's insanity, the verdict should be for the plaintiffs.

There was also error in the admission of the evidence referred in the third assignment. Its is true it admission would seem to be sustained by the *dictum* in Rogers v. Walker, 6 Barr, 375. But the point did not arise in that case, and the remark referred to was evidently used by way of illustration. We are unable to see how the neighborhood reports of Moore's insanity could possibly have been legitimate evidence in this case. If offered to affect the bank with notice of insanity, it was not competent, for the reason that the reports were not brought home to the bank. If offered to prove the distinct fact of Moore's insanity it was clearly inadmissible. It was at best mere hearsay, and no amount of such evidence could legally establish such fact.

Judgment reversed and a *venire facias de novo* awarded.

The Rule in Fletcher v. Rylands — Water Stored in Reservoirs—Unprecedented Storm—Vis Major —Negligence.

NICHOLS v. MARSLAND.*

English Court of Exchequer, May 27 and June 12, 1875.

The defendant was the owner of certain lakes, constructed about a hundred years ago by damming up a stream An unprecedented fall of rain caused the lakes to burst their banks and destroy certain bridges. The jury found that there was no negligence in the construction and maintenance of the lakes. *Held*, that the defendant was not liable for damages done. Rylands v. Fletcher, L. R. 3 H. L. 330, 17 W. R. H. L. Dig. 17, distinguished.

Declaration by the plaintiff, as county surveyor, against the defendant for damages for negligence in keeping three lakes, which burst and flooded a stream called Bagbrook, and destroyed four county bridges.

Plea, not guilty. Issue.

At the trial before Cockburn, C.J., the following facts were proved:

The defendant had three lakes communicating with one another, which had been constructed about one hundred years ago, by damming up the Bagbrook stream. The upper lake was three acres in extent, and had a weir four feet wide; the middle lake covered one acre, and had a weir fifteen feet wide; the lower lake was eight acres in extent, and had a circular weir eight feet in diameter, and a culvert three feet in diameter and ninety-three feet long.

On the night of June 18, 1872, there was a remarkable storm, and it was proved that no such rainfall had ever been known before. Rain began to fall at three P. M. on June 18, and continued until three A. M. on the following morning. During that night the banks of the three lakes gave way, the water rushed down Bagbrook with great violence, and destroyed four of the county bridges, the expense of rebuilding which the surveyor sought to recover in this action. Some of the plaintiff's witnesses gave it as their opinion that the weir of the upper lake was of insufficient size. It was also proved that four culverts above the lakes had been washed away on that night.

After the evidence for the plaintiff had been given, and before any evidence had been offered on behalf of the defendant, the jury stopped the case, and said that their minds were made up that the flood was caused by *vis major*, and that there was no negligence in the construction or maintenance of the lakes, and that the rain on the night in question was most excessive. Cockburn, C. J., then said—"There is no doubt that on this occasion there was a greater downfall of rain than in the memory of living man ever fell before in the neighborhood. The jury have negative negligence, and I direct the verdict to be entered for the plaintiff, with leave to the defendant to move to set it aside, and enter the verdict for him if the court should be of opinion that such a downfall of rain as that described by these witnesses amounts to *vis major*, and so distinguishes this case from Fletcher v. Rylands, the court to be at liberty to draw inferences of fact"

Sir J. Holker, S. G., obtained a rule accordingly on the ground that there was no proof of liability, the plaintiff to be at liberty to contend that a new trial should be granted on the ground that the finding of the jury was against the weight of evidence.

McIntyre, Q. C., and *Coxon*, showed cause. The defendant is liable for bringing on his land a quantity of water, which has become mischievous through not being kept in proper control: Rylands v. Fletcher, L. R. 3 H. L. 330. [KELLY, C. B. Does not the finding as to *vis major* protect the defendant?] No; he is liable, as he was bound to guard against all risks; the water was stored there for his own pleasure, and not under any act of Parliament for a public beneficial purpose; even an earthquake would not be

*The report of this case as here given is taken from 23 Weekly Reporter, 693.

a valid excuse here. [CLEASBY, B. Is it not the fact that the excess of water alone was dangerous, and that that excess came on the defendant's land without his will?] No, for his predecessor in title originally penned the water up by damming up the stream. [BRAMWELL, B. Suppose a man's chimney were struck by lightning and fell into his neighbor's house? KELLY, C.B. Or that A.'s house, being much higher than B.'s, was blown over on B.'s by an unprecedented gale?] If the house or the stack of chimneys were properly built, the defendant in such an action might be excused, on the ground that houses are necessaries of life; but ornamental lakes certainly are not. [BRAMWELL, B. Is not an earthquake *vis major*, but is there not also a relative kind of *vis major*, that is to say, as far as the practical possibilities of life are concerned?] Even an unprecedented fall of rain can not relieve the defendant of his liability, for it is clear that with larger weirs no accident would have occurred, They also contended that the finding of the jury was against the weight of evidence.

G. B. Hughes and *Dunn* (*Sir J. Holker, S. G.*, with them), in support. The unprecedented amount of rain was equivalent to *vis major*; the weirs had never been found of insufficient size before, and the lakes had been in existence for a hundred years; it is well-known that banks such as these settle and strengthen by time, and that puddling improves and becomes more impervious to water. Such a rainfall as this comes within the meaning of the phrase, *Actus Dei*: Brooms Legal Maxims, ed 5, p. 230; Amies v. Stevens, 1 Str. 128; Reg. v. Sommerset Commissioners of Sewers, 8 Term Rep. 312; Trent Navigation Company v. Wood, 3 Esp. 127; Smith v. Fletcher, L. R. 9 Ex. 64, 22 W. R. Dig. 146; Madras Railway Company v. Zemindar of Carvetinagarum, 22 W. R. 865, 30 L. T. N. S. 770. May v. Burdett, 9 Q. B. 101, does not apply here; and as the flood came on the defendant's land without his will, Rylands v. Fletcher is not in point. As it is not wrong to have an ornamental lake, positive negligence must be known: Jackson v. Smithson, 15 M. & W. 563. They also contended that the findings of the jury were warranted by the evidence.

Cur. adv. vult.

June 12.—BRAMWELL, B., delivered the judgment of the court:*

In this case I understand the jury to have found that all reasonable care had been taken by the defendant, that the banks were fit for all events to be anticipated, and the weirs broad enough; that the storm was of such violence as to be properly called the "act of God" or *vis major*. No doubt, as was said by the counsel for the plaintiff, a shower is the act of God as much as a storm; so is an earthquake in this country; yet everyone understands that a storm, supernatural in one sense, may properly, like an earthquake in this country, be called the "act of God," or *vis major*—no doubt, not the act of God or *vis major* in the sense that it was physically impossible to resist, but in the same sense that it was practically impossible to do so. Had the banks been twice as strong, or, if that would not do, ten times as strong and ten times as high, and the weir ten times as wide, the mischief might not have happened; but those are not practical conditions; they are such that, to enfore them would prevent the reasonable use of property in the way most beneficial to the community. So understanding the finding of the jury, I am of opinion the defendant is not liable. What has the defendant done wrong? what right of the plaintiff has he infringed? He has done nothing wrong, he has infringed no right. It was not the defendant who let loose the water and set it to destroy the bridges. He did, indeed, store it, and stored it in such quantities that, if it were let loose, it would do, as it did, mischief. But suppose a stranger let it loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbor, the occupier would be liable; but that can not be. Then why is the defendant liable if some agent over which he has no control lets the water out? It was contended by the counsel for the plaintiff that the defendant would be liable in all cases of the water being let out, whether by a stranger, or the queen's enemies, or by natural causes, or lightning, or an earthquake. Why? What is the difference between a reservoir and a stack of chimneys for such a question as this? Here the defendant stored a lot of water for his own purpose; in the case of chimneys some one has put a ton of brick fifty feet high for his own purposes—both equally harmless if they stay where placed, and equaliy mischievous if they do not. The water is no more a wild or savage animal than the bricks while at rest, nor more so when in motion; both have the same property, and obey the laws of gravitation; could it be said that no one could have a stack of chimneys except on the terms of being liable for any damage done by their being overthrown by a hurricane or an earthquake? If so, it would be dangerous to have a tree, for a wind might come so strong as to blow it out of the ground into a neighbor's land, and cause it to do damage; or again, it would be dangerous to have a field of ripe wheat, which might be fired by lightning and do mischief. I admit that it is not a question of negligence. A man may use all care to keep the water in, or the stack of chimneys standing, but still he would be liable if through any defect, even though latent, the water escaped or the bricks fell. This case differs wholly from Rylands v. Fletcher there the defendant poured the water into the plaintiff's mine; he did not know he was doing so, but he did it as much as though he had poured it into an open channel which led to the mine without his knowing it. Here the defendant merely brought the water to a place whence another agent let it loose, but that act is that of an agent he can not control. I am by no means sure that the comparison of water to a wild animal is exact; I am by no means sure that if a man kept a tiger and lightning broke his chain, and he got loose and did mischief, that the man who kept him would not be liable. But this case, and the case I have put of the chimneys, are not cases of keeping a dangerous beast for amusement, but of a reasonable use of property in a way beneficial to the community. I think this analogy has made some of the difficulty in this case. Water stored in a reservoir may be the only practical mode of supplying a district, and so adapting it for habitation. I refer to my judgment in Fletcher v. Rylands, 13 W. R. 992, 3 H. & C. 774, and I repeat that here no right of the plaintiff's has been infringed, and I am of opinion that the defendant has done no wrong. The plaintiff's right is to say to the defendant, *sic utere tuo ut alienum non lædas*, and the defendant has done this, and no more. The Lord Chief Baron and my brother Cleasby agree in this judgment. As to the plaintiff's application for a new trial on the ground that the verdict of the jury was against evidence, we have spoken to the Lord Chief Justice, and he is not dissatisfied with the verdict, and we can not see that it is wrong. The rule will, therefore, be absolute to enter the verdict for the defendant.

Rule absolute.

Attorney for the plaintiff, *Philpot.*
Attorney for the defendant, *Byrne.*

*Kelly, C. B., Bramwell and Cleasby, BB.

Selections.

REMARKS UPON RECENT ENGLISH CASES — *Public Policy.*— Two cases relating to questions of public policy, as bearing upon the legality of contracts and the power to enforce them, have recently been decided in the Court of Chancery In the case of Estcourt v. Estcourt Hop Essence Company (10 Law Rep., Ch. Ap. 276), the plaintiffs, who were manufacturers of a substance called *Escourt's Hop Supplement*, sought to restrain the defendant from selling a substance which he called *Hop Essence*, and which, they maintained, to be identical with their *Supplement*, and the sale of which they contended was a gross breach of faith towards them, and in violation of his agreements. They further sought to restrain him from making use of the name *Hop Essence*, as calculated to mislead the purchaser of the *Supplement*. Upon the

merits, the defendant was ultimately successful, the Lord Chancellor (Cairns), and Lord Justice (Mellish), being of opinion that the plaintiffs had failed to establish their case, and that the bill ought to have been dismissed. But upon the question of costs the former judge remarked—"The case is very peculiar. The plaintiffs ask us in fact to try the issue whether the two compounds are the same, but do not reveal what is the composition of the substance which they sell. The defendants also do not offer to discover what is the composition of the substances which they profess to make. They are both entitled to practice this concealment, but they can not ask the court to decide an issue which can not be satisfactorily dealt with, unless the composition of the substances is known. This, however, is not all. It is impossible not to see that these substances are introduced, recommended and sold for the purpose of enabling brewers to supply to the public a liquid which they may represent to the public as being made with pure hops, when it is not in fact so made. It is also clear that this was to be done secretly, because if the public knew what was done, they would not buy the beer so manufactured. I do not express any opinion whether the use of these compounds would come within the description of adulteration, but clearly the object was to induce the public to buy one thing when they thought they were buying another. It is not the province of this court to protect speculations of this kind, nor ought a defendant who is engaged in a business of the same kind, to obtain costs even when successful." It is somewhat difficult to see upon what principle this decision as to costs was founded. *Pacta illicita* and *contra bonos mores*, have often formed the subject of judicial decision, but where the contract was deemed immoral, action was refused, and the court did not go into the merits at all. Here the merits appear to have been fully discussed, with the effect of securing the defendant from the restraint sought to be imposed upon him by the plaintiffs, and yet, contrary to the general and well established rule, he could not recover his expenses. It might be true that he was engaged in the same trade as the plaintiffs, and his position as regards the public might be the same, but his position as regards this particular matter of the injunction sought to be put upon him was different. He had succeeded in his defence, and why was he denied the full benefit of that success? Such a case would seem to occupy a middle place between actions founded upon ordinary and respectable contracts, and those which from the immoral character of the obligation will at once be expelled from a court of justice.

In the case of The Printing and Numerical Registering Company v Sampson, 10 Law Rep. E. C. 462, an attempt was made to get rid of an agreement by which certain parties had assigned all future patent rights of a like nature, to a particular patent sold, on the ground that such a patent was against public policy, as it tended to discourage inventors. It was contended that if a man knew that he had already received the price of his invention, he will not make public any invention. It seems a strange and desperate argument to have advanced, but was seriously considered by Sir G. Jessel, M. R., who said in giving judgment: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing, which more than another public policy requires, it is that men of full age, and competent understanding, shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract." Having gone on to shortly state the principle under discussion, and the extent to which it has been applied, viz., to acts against public policy, or against the rules of morality, he observes: "I should be sorry to extend the case much further. I am satisfied there is no reason for so extending it in this case. In the first place, it has been assumed that a man will not invent without pecuniary reward. Experience shows us that that must not be taken as an absolute truth. Some of the greatest inventions which have been of the most benefit to mankind, have been invented by persons who have given their inventions freely to the world. Again, it is supposed that a man who has obtained money for the future products of his brain, will not be ready to produce these products. That must not be assumed. Nothing is more common in intellectual pursuits than for men to sell beforehand the future intellectual product before it is made or even conceived." Having given examples, he continues: "These examples are to my mind, entirely repugnant to the argument, that there is any public policy in prohibiting such contracts. On the contrary, public policy is the other way. It encourages the poor, needy, or struggling author or artist."

Presumed Marriage.—In the case of Lyle v. Ellwood, 19 L. R. E. C. 98, a judgment was given by Vice-Chancellor Sir Charles Hall, dealing with the subject of marriage, by habit and repute so familiar to Scotch lawyers. In that case the question of importance came to be whether or not a marriage had been entered into between a certain John Ellwood and Sarah Campbell. By the law of England it would appear that the evidence required to establish a marriage depends upon the object for which the proof of marriage is required. Thus habit and repute would not be sufficient in an indictment for bigamy, although it might hold good where the marriage is not the point so directly in question. In Lyle's case, evidence of marriage was necessary in order to establish a claim on next of kin, and it consisted of a divided repute. The parties had lived in various parts of Scotland as man and wife, and had entered their children as legitimate in baptismal registers. On the other hand, proof was led that amongst the relatives and connections they had not been treated as married persons, and in Ellwood's will no provision was made for his children by Sarah Campbell. The case was treated, it may be stated, as not depending upon Scotch law. It was maintained in the argument against the marriage, that a reputation such as that set up must not be divided, and Mr. Fraser was quoted, who lays down that "if the repute be divided, it is no repute at all." The Vice-Chancellor, however, founding upon a number of decided cases, including that of Breadalbane, has rejected this contention. He observed in giving judgment: "It can not, I think, be contended that wherever there is evidence of repute on one side and on the other a marriage can not be established. It appears to me that the court can, and should in the present case, receive and act upon the evidence to which I have referred, as answering and outweighing the evidence that there was a repute that there had been a marriage."—[*The Journal of Jurisprudence* (*Edinburgh*).

THE SANCTITY OF JUDICIAL DECISIONS.—If the truth justified Mr. O'Conor's letter, Mr. O'Conor was especially the man to write it. And if the senior leader of the bar believed that justice was tainted in its highest seat in the state, it was his imperative duty to sound the alarm plainly and fearlessly as he has done. He is not to be answered by the censure of Tweed's lawyers, nor by the impotent cry that the decisions of the courts are sacred from criticism. Mr. George F. Comstock, ex-Judge of Appeals, and one of Tweed's counsel, has written a letter reviewing that of Mr. O'Conor, and in the act of rebuking that gentleman for criticising the judgment of one court, he says of another, "I know of no precedent for such a trial since the times when Jeffreys and Scroggs administered the criminal law of England." And again he speaks of the transfer of the case "from the murky atmosphere of Judge Davis's court, charged with electric passion and vaulting ambition, to the court of appeals, where all is calmness and deliberation." The critic is unwary. If Mr. O'Conor pointed out that one court has uniformly favored Tweed, is it for a lawyer who is paid with the money that Tweed has stolen, and who denounces the judge

of another court as a Jeffreys and his decisions as lawless, to call Mr. O'Conor to account for want of respect for the judiciary?

It is an astounding doctrine that the opinions of courts are not to be criticised. It was the universal and unrelenting criticism of the monstrous Dred Scott decision—a judgment of the Supreme Court of the United States—that helped to rouse the country to save its liberty and government. "What are you going to do about it?" was the sneer with which the critics of that decision were taunted, and the sneerers have had their answer. It was the peremptory challenge both of the legal-tender decision and its reversal which showed the healthful vigilance and independence of the public mind. And for ourselves we recall nothing with more satisfaction than that we joined with the Times and a few other journals in assailing Judges Barnard and Cardozo in the very height and prime of their power, and the power of Tweed, their master. In the light of known facts it is not a handsome spectacle, that those who were silent under the iniquities and appalling prostitution of the bench to Tweed seven or eight years ago, are now raising their voices, with Tweed's stolen money jingling in their pockets, in bitter denunciation of the magistrate who sentenced him as a Jeffreys and a Scroggs. In associating the name of Judge Davis with that of Jeffreys, Mr. Comstock, paid by Tweed, is guilty of a very gross offence. How gross, let any reader turn to English history and see.

Was it the duty of all good Englishmen not to criticise the bloody assizes? On the contrary, was there any higher duty than to decry and expose the infamy as loudly and as broadly as possible? What remedy remains to the people if criticism and censure of judicial outrages are to be suppressed as "insults to the bench?" What is so sure to secure respect for the judiciary, by promoting its respectability, as its consciousness that its conduct is carefully watched and weighed? In a state where judges are elected, and where elections are so often carried and managed by Tweeds and corrupt rings, what surer cloak of corruption upon the bench than the understanding that criticism of the action of courts is an insult to the bench? Readers out of the state of New York, may not be aware that there are singular facts and reports in regard to that court "where all is calmness and deliberation." Its chief justice is a conspicuous politician, who was last year the intended candidate of the democratic opponents of Governor Tilden, and who has recently publicly assailed the motives of one of the counsel for the people in the Tweed suits, while the figures of the votes for one or two of the Judges of Appeals are publicly cited as evidence that they were "counted in" by the Tweed interest. These things, however painful, are necessarily remembered when the uniformity of the decisions of the court in favor of Tweed is remarked, and they are the reserved force of Mr. O'Conor's letter.

As we said when the decision was published, the release of Tweed was humiliating, but if the laws, honestly interpreted and administered, are not adequate to the punishment of such offenses as Tweed's, we must all submit and wonder. The release may have been law, but it was certainly not justice, and the fact remains that lawyers quite as astute and able as Mr. Comstock or any of Tweed's counsel, are of opinion that the laws are quite sufficient for justice, if they could only be applied. Nevertheless, the opinion of the highest court will always be respected, however lawyers may differ as to its merits, so long as the court itself is above suspicion. Nor will any sensible man easily suffer it to fall under suspicion. But when one of the greatest lawyers in the country, and of spotless personal character, takes the responsibility of calling it to account, no sensible man will affect to think the matter disposed of by calling his charge an insult to the bench. And as the present court is elective, the result of its decision upon the Tweed case, will necessarily be to strengthen the conviction that there should be an absolute separation of the bench from politics, so that every magistrate as he seats himself, should understand that the political career is closed to him while every man who proposes a judge for political office should be regarded as assailing social order.—[*Harper's Weekly*.

Correspondence.

ST. LOUIS, August 2, 1875.

EDITORS CENTRAL LAW JOURNAL:—The agitation of the question of the admissibility of evidence as to the character of the deceased in cases of homicide, suggests the question of the admissibility of evidence as to the character of *witnesses*; not with reference to their "general reputation in the community for truth and veracity," but for the purpose of determining, from their habits and mental characteristics, to what extent they are accustomed to regard the sanctity and binding force of the obligation of the oath they are required to take, and what degree of credibility is to be accordingly attached to their testimony. Children and persons suspected of being unsound in mind, before being allowed to testify, are usually examined preliminarily, to ascertain whether they are competent to testify; and if found to be ignorant of the nature of an oath, and the consequences of telling an uutruth, they are held incapable of giving testimony altogether. Witnesses who are suspected of lying habits, are subject to a severer test, and evidence of such habits, and that their "general reputation for truth and veracity" is bad, is admitted to impeach and destroy their testimony.

The testimony of witnesses who are interested in the subject-matter or event of the suit, is either entirely disregarded, or so modified as to render it of much less than the full weight it would otherwise have upon the minds of the jury. In all such cases the judge is required to guide and instruct the jury in their consideration of such testimony, and to explain to them the degree of weight they are to attach to it.

Now, if suspicion attaches to the evidence given by a person interested in the event or subject-matter of the suit, without reference to his reputation for truth and veracity; if the infant or imbecile who is incapable of comprehending the nature of an oath, is entirely prohibited from testifying; and if the evidence of the liar is suffered to be impeached, and the jury instructed to disregard it, why should not similar rules apply to the testimony of persons of notoriously profligate character, and those who have so little comprehension of, or regard for the solemn nature and sanctity of the oath which they are required to take in open court, "upon the Holy Evangelists of Almighty God," that they make it their daily habit to take in vain the name of that God to whom they now so solemnly appeal, and spend their lives in utter disregard and open defiance of the very principles by which they are supposed to be governed in taking the oath?

In other words, can such an oath, by such a person, be supposed to have as much, or more or less binding effect upon the conscience and acts of the witness, than if taken by the infant, the imbecile, or the person interested in the suit?

This is not a question of religion. It is not a religious test. It is a plain, simple, practical question, such as every judge is required to solve and elucidate to every jury, in every case where the testimony of infants, imbeciles, or persons interested, is offered. It is not a question of the honesty or the mental capacity, or the reputation for veracity, of the witness, any more than it is a question of excluding his evidence because he happens to differ in his "religious views" from his fellows. But it is a question whether the testimony of a person who has *no* religious views, no reverence for the oath he takes, or the God in whose name and presence he takes it, is to occupy precisely the same ground, and be entitled to the same degree of faith and credibility, as the testimony of one, his exact opposite in every such respect.

Of what use is it to administer an oath upon the Bible, to a witness who does not believe a word in it? And where is the advantage to be gained in requiring a witness to swear with uplifted hand, to tell "the truth, the whole truth, and nothing but the truth, so help you God!" when that God is the constant subject

of derision and blasphemy to him? Would it not be better to abandon the use of the oath altogether in courts of justice, than make it such a mockery as this? Or else adopt such rules of evidence as would graduate and modify, and fix bounds upon the admissibility and effect of such testimony?

This is a curious and interesting subject, Messrs. Editors, and it is to be hoped that we may hear, not only from you, but from some of your readers, in regard to it. C.

COMMENTS.—Whilst cheerfully publishing the above suggestions, we hope it will not be for a moment supposed that we concur in them. The above writer is manifestly mistaken in several respects as to the present state of the law. 1. Evidence of the "habits" of witnesses as to truth and veracity is never admitted, as he intimates, for the purpose of impeaching their testimony. It is alone their *reputation* for truth and veracity which can be called in question. 2. Judges are never permitted, as he intimates, to explain to juries the "degree of weight" they are to attach to particular testimony. Judges constantly intimate to juries the legal effect of certain testimony, if believed. "If you believe from the evidence so and so, your verdict will be so and so," is the stereotyped form of instructions to juries. The judge may also, doubtless, with propriety tell the jury that in estimating the value of a particular witness' testimony, they should consider the fact that he is interested in the event of the suit. But if he undertakes to tell them *how far* they are to credit a witness on this or any other account, or, in other words, the "degree of weight" they are to attach to his testimony, he clearly invades their exclusive province. 3. It is not necessary, as the above writer intimates, that witnesses should be sworn "on the Holy Evangelists of Almighty God." Various other forms of oaths are administered to non-Christian witnesses; and the statutes, we presume, of every state in the Union permit an affirmation to be administered in the place of an oath, where the witness has scruples about taking an oath in the prescribed form; and witnesses are constantly permitted simply to *affirm* that they will tell the truth, under the pains and penalties of perjury.

The premises on which "C." bases his suggestions consisting thus of erroneous views as to the present state of the law, it would seem unnecessary to consider his suggestions further. One or two counter suggestions may not, however, be inappropriate. It is believed that the rule which excludes evidence of the moral character and habits of witnesses is grounded in two considerations: that of convenience, and that of public policy. 1. If the general character and habits of every witness were to be investigated, it is obvious that litigation would be interminable. 2. If the moral character and habits of every witness were liable to be made a subject of public investigation in courts of justice, men of delicate sensibilities would be deterred from appearing as witnesses, and justice would thus in many cases be defeated.

As to the suggestion that a man's habits as to blasphemy furnish a test of his truthfulness, we have never supposed this to be the case. The army that "swore terribly in Flanders" was no doubt composed of bluff, honest soldiers. A habit of blasphemy is an evidence of an irreligious and vulgar cast of mind; but it is believed that in the ordinary affairs of life little attention is paid to it in estimating men's truthfulness; and we believe that any change in the rules of evidence based upon the supposition that it would afford a safe test would be found misleading and chimerical. If the law has passed through ages of superstition and barbarism—ages when the courts were presided over by ecclesiastical judges—without such tests being engrafted upon it, it is surely too late to talk of such things now. The common sense of the nineteenth century would receive such propositions with derision. Notwithstanding the disclaimer of "C.," what he proposes is in the main a religious test, whereas history and experience show that there is no necessary connection between morals and religion, and notwithstanding the fact that the manifest tendency of modern legislation is to repeal such tests as applicable to the credibility of witnesses.—[Ed. C. L. J.

Recent Reports.

REPORTS OF CASES DETERMINED IN THE SUPREME COURT OF THE STATE OF CALIFORNIA, at the January, April, July and October Terms, 1874. CHARLES A. TUTTLE, Reporter. Volume 48. San Francisco: Sumner, Whitney & Co.; A. L. Bancroft & Co. 1875. Printed by A. L. Bancroft & Co.

This volume is in the best style of its well-known publishers, and has scarcely a defect. The division of the syllabi into paragraphs with small-cap side-heads, is particularly pleasing, and the work, both of the reporter and publishers, is generally well and carefully done. One hundred and thirty-two cases are reported. The pages are almost full width, with forty lines on each, showing a desire on the part of the publishers to get a fair amount of matter into the volume. The use of small-caps, instead of large for the titles of the cases, would have saved much valuable space. There is a list of all the attorneys who have been enrolled in the court since the publication of vol. 28, but no table of cases cited.

Real Estate—Adverse Possession.—McManus, Admx. v. O'Sullivan, p. 7. Opinion by Wallace, C. J. An adverse possession of land, which will bar an action to recover possession of it, under the Statute of Limitations, is a possession merely hostile to the particular claim of the other party in the action, to which it is oppossed in proof.

Public Lands—Contest as to the Right to Acquire.—Young v. Shinn, p. 26. Opinion by Rhodes, J. When two parties have each an equal right to acquire public lands, the one by location and purchase from the state, and the other by locating as a homestead under the laws of the United States, the party who first commences his proceedings to acquire the title has the better right.

Mandamus—Admission of Child into Public Schools—Fourteenth Amendment.—Ward v. Flood, p. 36. Opinion by Wallace, C. J. A motion by the applicant for the writ of mandamus, that the writ issue notwithstanding the matters alleged in the defendant's answer, amounts to a general demurrer to the answer. The rule that one who bases his refusal to perform an official act on some defect in his adversary's proceedings, will not afterwards be permitted to allege a new defect, does not apply to officers whose duties are governed by law. The writ was applied for to compel the principal of a public school to admit a colored child thereto. The law provides for the education of such children in separate schools. The board of education had made provision accordingly. *Held*, that if such principal refuses to receive a child for a reason which is not good in law, but there is a good legal reason for the refusal, the principal will not be precluded, on application for mandamus, to compel him to admit such child, from relying on such true reason. He may refuse to receive a child, in a graded school if the child is not sufficiently educated to enter the lowest grade. The law providing for the education of black children in separate schools is not in conflict with the constitution, or with the fourteenth amendment thereto; and colored children may be excluded from the schools where white children are educated, provided separate schools are established for them, with the same facilities as those enjoyed by the schools for white children.

Mining Stocks—Innocent Purchaser.—Thompson v. Toland, p. 99. Opinion by Crockett, J. In this state mining stocks properly endorsed pass by delivery; and if the true owner places them in the hands of another, on some secret trust between them, without notice to subsequent purchaser, or any thing on the face of the certificates to show such trust, the true owners and not the innocent purchaser must bear any loss which may occur.

Liability of City for Negligence of a Contractor.—O'Hale v. Sacramento, p. 212. In this case, and in Krause v. Sacramento, p. 221, the court held, affirming James v. San Francisco, 6 Cal. 528, that the city is not liable for damages caused by the negligence of the contractor on public works, when the law requires the city authorities to let out the work on contract.

Pre-emption—Contests between Claimants—Review by the Court of Acts of Law Officers.—Burrell v. How, p. 222. Opinion by McKinstry, J. The courts will not pass upon the sufficiency of the evidence, upon which the land officers based their action in awarding a patent for pre-empted lands; but fraud upon the land officers must be shown before their action will be enquired into. [Or error by the said officers in matter of law. Hess v. Bolinger, p. 349.]

Life Insurance—Payment of Premium.—Howard v. Continental Ins. Co., p. 229. Opinion by McKinstry, J. Where payments of premium are to be made thrice yearly, and one-third of the premium is endorsed as a loan on the policy, the payment of the premiums must be made as they fall due, and the loan of such portion does not have the effect of giving a credit for the second and third payments of the premium.

A clause in the policy, that at the death of the insured the company may deduct any balance of the years's premium due and unpaid, does not have the effect of extending credit for any portion of the premium.

"Local Option Laws"—Statute to take effect upon the Happening of a Future Event.—Ex parte Wall, p. 279. Opinion by McKinstry, J. The report of this case occupies 45 pages of the book. It is a decision of very great ability and importance, involving the extent of the law-making power. By an act of the legislature, approved March, 1874, it was provided that, whenever one-fourth of the legal voters of any township, incorporated city, or town, should petition the Board of Supervisors of the county in which the town, etc., was situated, to call a special election to vote upon the question of "liquor license." or "no liquor license," the Board of Supervisors must within one month afterwards call such election, etc., and if a majority of the ballots at such election were "against license," then no license to retail liquor should be granted, etc., and it should be unlawful for

any person to sell, etc. The statute imposed punishment by fine and imprisonment, for its violation.

The petitioner, Wall, was convicted and fined under the act, failing to pay which, he was imprisoned, whereupon he sued out the writ of *habeas corpus* herein. We give the syllabus of the case almost entire. The power to make laws conferred upon the legislature by the constitution, can not be delegated by the legislature to a portion of the people, Although a statute may be conditional, so that its taking effect may depend upon a subsequent which may be named in it, yet this court must be one which shall produce such a change of circumstances that the law-makers, in their own judgment can declare it wise and expedient that the law shall take effect when the event shall occur; and the legislature must pass upon the question of expediency, and can not say that it shall be deemed expedient, provided the people, by a vote, shall afterwards declare it to be expedient. Such a statute must be a law *in præsenti* or take effect *in futuro*.

The court accordingly ordered the discharge of the prisoner. [For the opinion of the court in this case, see 1 CENT. L. J. 592.]

"Twice in Jeopardy"—Discharge of Jury without Verdict.—People v. Cage, p. 323. Opinion by Niles, J. When a person is placed upon trial on a valid indictment, before a competent court and jury, he is "in jeopardy" within the meaning of the constitutional provision that "no person shall be twice put in jeopardy for the same offence." In such case, the discharge of the jury without verdict, unless by consent of the defendant, or from some unavoidable accident, or necessity, is equivalent to an acquittal. The inability of the jury to agree after a reasonable time for deliberation, is such an unavoidable necessity. But the order discharging them must be based on good grounds, and if the jury is so discharged without any evidence but the statement of the officer in charge of them that they can not agree, it is equivalent to an acquittal. See next case.

Discharge of Jury—Acquittal.—People v. Hunckeler, p. 331. Opinion by McKinstry, J. When the court, in a trial for manslaughter, without the consent of the defendant, discharges the jury because the court is o opinion that the evidence shows the defendant to be guilty of murder, the defendant can not again be tried for the same killing, or be again put in jeopardy, and is entitled to his acquittal. See Bell & Murray v. the State, 1 CENT. LAW J. 630.

Property of a Corporation—Fraudulent Conveyance by a Corporation—Formation of New Corporation by Members of Old One.—San. F. & Northern Pac. R. R. v. Bee, p. 398. Opinion by Wallace, C. J. The property of a railroad corporation is vested in its trustees, to be preserved by them as a fund to secure creditors of the corporation. If the persons interested in one railroad corporation, form a new one, which chooses for its officers the officers of the old corporation, and the persons owning the stock of the old corporation receive in exchange therefor stock of the new, and the trustees then cause the property of the old corporation to be conveyed to the new, the conveyance is a fraud upon the creditors of the old corporation.

Negligence—Railroad Track Crossing Street.—Robinson v. Western Pac. R. R., p. 409. Opinion by McKinstry, J. When the track of a railroad crosses a city street, and a train is stopped so that the last car stands just in the crossed street, and a person going along said street, crossing the track just behind the last car, is injured by the train being backed onto him, without notification or warning, the employees of the railroad company are guilty of gross negligence, and the company liable. The injured person, in such case, is not guilty of contributory negligence, as he had the right to presume that he would be notified of the moving of the train.

Mechanic's Lien of Sub-contractor.—Quale v. Moon, p. 478 Opinion by McKinstry, J. The lien of a sub-contractor, for work done or materials furnished, does not depend on, and is not suspended until the completion of the building.

Corporations—Formation of—Legislative Grants to Individuals who are to form a Corporation.—San Francisco v. the Spring Valley Water Works, p. 403. Opinion by Crockett, J., and McKinstry, J., concurring; Rhodes, J., dissenting. Corporations in this state, except for municipal purposes, must be formed under general laws, and can exercise no powers except such as are conferred by such general laws. The Legislature can not confer on such corporation any powers, or grant them any privileges by special act. An act which grants to individuals and their assigns certain powers and privileges, and then provides that the act shall not take effect unless the persons to whom the grant is made shall, within a certain time, organize themselves into a corporation under existing laws, is a grant, not to the individuals as persons, but to the corporation when formed, and is an attempt of the legislature to confer powers and privileges on a corporation by special act, and is void. Such corporation, when formed, possesses no powers or privileges, except such as are conferred by general laws. C. A. C.

COURT OF CLAIMS REPORT, Vol. 9. Cases decided in the Court of Claims at the December term, 1873, and the decisions of the Supreme Court in the appealed cases from October, 1873, to May 1874. CHARLES C. NOTT (one of the judges), and ARCHIBALD HOPKINS (chief clerk of the court), reporters. Washington, D. C.: W. H. and O. H. Morrison. 1875. pp. 575.

This volume contains 122 cases covering many questions based upon contracts with the government, the sale of captured or abandoned property, the capture of prizes, and the settlement of commercial or property rights complicated by a state of war. It is clearly printed and the cases are furnished with convenient head lines by which the reporter's statement, the arguments for either party, and the opinion may be readily distinguished and referred to without groping for the place where one leaves off and another begins. The index omits all cross-references, but classifies the points of law decided, and if any one point refers to more than one subject, it appears in full under each heading. The head-notes are sometimes unnecessarily full. Although this is a fault on the safe side, it is always desirable to divest statements of legal principles, as completely as possible, of the circumstantial details from which they are drawn. To encumber a head-note with narrative, implies that its application is limited to the state of facts therein set forth, and often obscures the principle embodied in it. The disposition of appealed cases in the supreme court, occupies about a quarter of the volume. There is also a report of the proceedings taken by the court of claims upon the announcement of the death, in April, 1874, of Judge Samuel Milligan, one of its members, a short sketch of whose life is furnished. He was succeeded upon the bench by Hon. Wm. A. Richardson, ex-secretary of the treasury.

The following points of law decided by the two courts are interesting.

Supreme Court—Admiralty—Wages of Vessels in Custody.—A vessel's charterers, having no control of her while she is in legal custody under the libel of a court of admiralty, are not liable for her wages at the agreed rate meanwhile. Goodwin's Case.

Captured or Abandoned Property—The Non-intercourse Act.—A New York merchant who had no license to trade in Savannah, could no acquire title to personal property by purchase there, even after the United States troops had occupied the city, so long as the laws suspending commercial intercourse were in force, and could not therefore sue for the proceeds of such property under the Captured or Abandoned Property Act. Cutner's Case.

One residing in the insurrectionary districts, and within the military lines of the United States, *held* disabled from trading with the disloyal without, or the loyal within. Ensley's Case.

Where New Orleans Merchants had sent an agent into the interior to collect debts and buy cotton, the agency was ended by the capture of the city; subsequent purchases, though made with confederate notes, were void and gave no title to the cotton, so that the merchants can not recover for it under the Captured or Abandoned Property Act. Lapene's Case.

Contracts—Alterations imply Extension of Time.—A request from a contracting purchaser for an alteration in the article contracted for, implies sufficient extension of time for meeting the improvement. Amoskeag Company's Case.

Indians.—One who alleges the theft of his oxen by hostile Indians attacking a wagon train, is not entitled to relief under the act providing payment to "any person who has sustained damage by the capture, by an enemy," etc. The Indians are subject to the United States laws, and it cannot be inferred, generally, that they constitute a public enemy. Gutman's Case.

Military Law.—"Posts" defined to be military establishments where bodies of troops are permanently fixed, and "depots" places where military stores or supplies are kept or troops assembled. Caldwell's Case.

Court of Claims—Appeals.—Where a claimant has no right of appeal and the government has, he can secure no review in the supreme court unless he requests a judgement *pro forma* in his favor; otherwise the judgment would be final even though decisions of the supreme court in analogous cases were favorable to his claim. Osborne's Case.

Bailment.—The bailee of personal property under a common contract of hire, must pay the stipulated hire for the term agreed on, and return the property in as good order and condition, aside from reasonable wear, as when received. He thus takes the risk of loss, for which he must indemnify the owner, paying him the hire to the time thereof. The hirer must notify the owner of the loss. Smith's Case.

Captured or Abandoned Property Act.—A claimant, in estimating his recovery, must be limited to his own allegation of the amount of his cotton captured, though subjected to subsequent losses that reduced his recovery to less than the quantity alleged, while the evidence indicates that a larger quantity was captured. Boyd's Case.

An alien living abroad could acquire title to personal property in the insur-

rectionary district during the rebellion, by purchase through an agent there, and even though he was engaged in blockade-running, may sue for the proceeds of its sale under the Captured and Abandoned Property Act. Collie's Case.

A Mississippi slave before emancipation could not lawfully contract with his master nor acquire property; where a master sold cotton to his slave, therefore, no title passed, and after the rebellion the master could sue for the proceeds of the cotton, but the slave could not. Hall and Roach's Case.

If captured property is commingled and the identity of individual ownerships lost, each owner can recover only out of the common fund derived from the mass, and if the mass was subjected to losses, the owners must contribute thereto in the ratio of their contribution to the mass. Boyd's Case.

One who sold to the confederate government cotton which remained in his possession till the end of the war, and was then captured, can not sue for it on the ground that the confederate government became insolvent, and that he still holds its bonds unpaid, and that he had the right of stoppage *in transitu* to enforce his lien as a vendor for the unpaid purchase-money. Whitfield's case. Opinion by Drake, Ch. J., Milligan concurring, with doubt; Loring dissenting, and Peck and Nott not sitting. The opinion can hardly be held decisive.

Comity between Nations.—As the Italian government permits itself to be sued in its own courts by American citizens, Italian subjects may sue the United States under the Captured and Abandoned Property Act. Fichera's Case.

Contracts.—A principal may sue in his own name on a contract made by his agent, even though the latter never disclosed the fact of agency, and the principal may give parol evidence of his interest outside the terms of the written contract. Sausser's Case.

An assignment of a government contract is void under 12 Stat. at Large, p. 596; but an assignment of money due under a contract passes title to the money as though it were the sale of a chattel. McCord's Case.

"More or less," as used in a contract are interpolated as words of intention and to be understood in their ordinary sense. If appearing in a contract for army transportation, they do not authorize the government to wi hhold part of the freight, any more than they allow the contractor to refuse to carry the same quantity when offered. Hardy's Case.

Upon a contract payable in gold, the judgment will be payable in gold. Ibid.

Criminals—Rewards for their Capture.—Where a proclamation offers rewards for the apprehension of a criminal, and for information conducing to his arrest, the former offer contemplates actual capture and delivery to the government, and is not fulfilled by information given which directly leads to his arrest by a foreign government, followed by the criminal's escape before delivery to the United States government. Ste Marie's Case.

Duress is not exerted unless the imprisonment is unlawful, or by an abuse of lawful aurhority. Hill's Case.

Insurance.—The proximate and not the remote cause of loss determines the insurer's liability. The government having insured a vessel against the "war risk," was held liable for its capture by the enemy, though it was driven on shore by a gale, and so fell into their hands. Clyde's Case.

The owner of a vessel chartered by the government for military purposes, assumed the "marine risks." *Held*, That he could not recover when it was wrecked in a fog, though it had been compelled to undertake the voyage in a military exigency, amid extra-hazardous circumstances, in the absence of its master and engineer, and against the remonstrances of its other officers. Mott's Case.

A landlord's fire policy, made in his own behalf and at his own cost, does not attach to the building insured, nor inure to the tenant's benefit; if the tenant is liable for the loss of the building by fire, he continues liable notwithstanding the payment of the loss by the insurers. Lovett's Case.

Landlord and Tenant.—Premises let to the government for a military hospital, may be used for small-pox patients, but not as a burial ground. Lovett's Case.

The liability of a tenant for destruction by fire is not incidental to his mere occupancy, where it is from year to year without express agreement to repair. But under an agreement to repair and keep in repair, the tenant is liable for loss by accidental fire, even though there be no deed with express covenants to repair in case of fire. Ib.

Military Law.—The honorable discharge of a deserter, whether regular or volunteer, is the government's formal final judgment on his whole military record, and a declaration that he left the service in honorable standing. Lander's Case.

Office-holder.—An incumbent of office, though disabled by disease from performing its duties, *prima facie* is entitled to the lawful compensation thereof, so long as he holds the place. The appointing power may remove him, but can not stop his pay. Sleigh's Case.

Shipping Impressed into Military Service.—The owners of a vessel that has been impressed into the military service, and injured while navigated by government officers, may recover for her use and service during the period of repairs. Dozier's Case.

Slavery.—If one who claims to have been born free, and he alleges that he was abducted and held as a slave in Mississippi, neglected to assert his right to freedom there, the Court of Claims, can not after the rebellion, try the question collaterally, but must assume that he was lawfully held as a slave, and subject to the legal disabilities of one. Hall's and Roach's Case.

The Statute of Limitations is not suspended as against the claim of an intestate, by the disability of his administrator through disloyalty, to sue the government. Sierra's Case.

The statute of limitations barring claims against the government, brought within six years after accruing (12 Stat. at Large, p. 765, § 10), does not begin to run until there is some person in existence qualified to sue upon them,—as where a claimant dies before his claim accrues, and his administrator is not appointed until afterwards. Fulenweider's Case.

Women are constitutionally disabled from practicing law in the federal courts. Mrs. Lockwood's Case. [See this case in full. 1 CENT. L. J. 254.]

H. A. C

Summary of Our Legal Exchanges.

THE WEEKLY REPORTER.*

Statute of Frauds—Interest in Land—Graving Dock—Contract by Corporation—When not to be Under Seal.—Wells v. The Mayor, etc., of Kingston-upon-Hull. Court of Common Pleas. [23 W. R. 562.] A corporation built on their land a graving dock which they let to ships in turn, but kept control over it by their servants. *Held*, from this and the special terms of the dock regulations, that no interest in land was intended to pass, or did pass, to ship-owners whose vessels used the dock. *Held*, further, that as the contracts for the use of the dock were of daily occurrence, and often—e. g., when vessels were injured by weather—admitted of no delay, such contracts were within the exceptions to the rule that a corporation can only contract under seal.

Execution of Will—Knowledge and Approval of ontents—Reading over.—Fulton and Others v. Andrew and Another. House of Lords. Before Lord Cairns, C., and Lords Chelmsford, Hatherley and O'Hagan. On issues directed by the court of probate to determine the validity of a will, evidence was given on the part of those propounding the will, that the will was read over to the deceased before execution, and this evidence those who impeached the will were not in a position to contradict. The jury found that the will was duly executed, that the testator was at the time of sound mind, that the execution was not procured by undue influence, and that the testator at the time of the execution knew and approved of the contents of the will, except as to the residuary clause, of the contents of which the testator did not know and approve. A verdict was entered accordingly. *Held*, that no new trial ought to be granted on the ground that the jury were not directed that if they believed that the deceased was at the time of the execution of sound mind, they were bound, upon the uncontradicted evidence that the will was read over to the deceased before execution, to find that he knew and approved of its whole contents. For (assuming that the jury believed the evidence of reading over, which they were not bound to do merely because no contradiction was in fact given to it), no irrebuttable presumption of knowledge and approval of contents would arise upon proof that the testator was of sound mind, that the will was read over to him, and that he thereupon affixed his signature.

Tenant's Fixtures—Sale Liquidation—Surrender of Lease—Non removal by Purchaser—Laches.—Saint v. Pilley.—Tenant's fixtures were sold by the tenant's trustee in the liquidation to A., but were no removed. The lease was surrendered by the trustee to the landlord, and the premises were let to another tenant who let them to B. A fortnight after the surrender, A. claimed the fixtures. In an interpleader issue between A. & B., *Held*, that A. was entitled to the fixtures, and had not lost his right by laches.

Charter-party—"Lien and Exemption" Clause—"Demurrage" and Damages for Detention.—Lockhart v. Falk, Court of Exchequer. [23 W. R. 753.] Where there is a clause in a charter-party giving the ship a lien on the cargo for freight and "demurrage," and exempting the charterer from liability when the cargo is delivered alongside the ship, and there is a stipulation as to the rate of demurrage at the port of delivery only, and not at the port of loading, the "lien and exemption" clause does not ap-

*London: Edward J. Milliken, 12 Cook's Court, Carey St., W. C.

ply to a claim in the nature of demurrage at the port of loading, and the charterer is entitled to recover damages for the detention. A stipulation that the loading shall be in "the customary manner," where there is a custom as to detention at the port of loading, does not make the detention at the port of loading a matter of contract, and so demurrage in the proper sense, or bring the case within the exemption clause.

Mercantile Law—Shipping—Jettison—Marine Insurance—Foreign Adjustment—General Average—Warranty against Particular Average—Broken Voyage.—Mavro and Others v. The Ocean Marine Insurance Company. Court of Exchequer Chamber. [23 W. R. 758.] The owners of a cargo of wheat in a vessel named the C., to be carried from V. to M., insured the same by a policy which provided that general average was to be paid "as per foreign statement," and there was also inserted a warranty against average unless general. Owing to bad weather the ship was obliged to hoist extra sail, whereby she was strained, shipped heavy seas, and sprang a leak, and part of the cargo was damaged by the water. She was thus compelled to break her voyage, and put in at the port of C., where she was repaired, and in order to effect the necessary repairs the sound portion of the cargo was reshipped and forwarded to M., a French port, and the remainder was sold. At C., a port where French law prevailed, an adjustment was made up according to that law, whereby the damage to the wheat was treated as a general average loss. The necessary repairs occasioned a delay of nearly three months at C.

Statute of Frauds, s. 17—Memorandum in Writing—Variation of one Term in Contract—Ratification.—The Leather Cloth Company v. Hieronimus. Court of Queen's Bench. [23 W. R. 593.] In February, 1870, the plaintiffs sent goods to the defendant in accordance with a verbal order, but not by the route named. The plaintiffs advised the defendant of the despatch, stated the reason for not sending the goods by the route named, but by the route usually chosen by the parties, and inclosed invoice. The goods were lost. No immediate answer was given by defendant on receipt of invoice, etc., but other orders were given and executed by sending the goods by the same route as the lost goods, that is to say the usual route. In June the plaintiffs sent statement of accounts, including charge for the goods in question; the defendant in reply sent a written answer acknowledging the order, but denying liability for the goods because they had not been sent by the route named at the time of order. The jury having found that defendant had acquissced in the change of route; *Held*, that there was a sufficient memorandum of the original contract to satisfy the statute of frauds; and that the assent to the change of route need not be in writing.

Railway Company—Estoppel—Mistake in Advice Note—Damages—Trover.—Carr v. The London and Northwestern Railway Company. Court of Common Pleas. [23 W. R. 747.] The plaintiff entered into a contract with A. & Co., to purchase goods which were consigned to him by the defendants' railway. The defendants by a mistake, without culpable negligence, advised the plaintiff of three parcels, whereas two only had been delivered to them for carriage. The plaintiff contracted to sell three parcels, and had to pay damages to his vendees in consequence of being able only to deliver two. The defendants did not notify the mistake to the plaintiff until he had re-sold. *Held*, that the defendants were not estopped from showing that they never received the third parcel. Quære per Denman, J. Whether trover can be supported by an estoppel *in pais*, when the defendants have never had the goods said to be converted. Four propositions of estoppel *in pais* laid down.

In an action against the underwriters on the policy;—*Held* (affirming the judgment of the court of common pleas), that the voyage was properly broken up at C., and that the defendants, under the terms of the policy and warranty, were bound by the adjustment according to foreign law.

CHICAGO LEGAL NEWS, AUG. 7.

Exemptions under the Bankrupt Law.—*In re* John Owens, United States District Court, Indiana, Gresham, J. [7 Chi. Leg. News, 371.] 1. Exemptions of property under the 14th section of the bankrupt law, to an amount not exceeding $500, in any one case, are good against pre existing debts and judgment liens. 2. An additional exemption is authorized by the same section to be made under the laws of the state wherein the proceedings in bankruptcy are pending. By the laws of this state exemptions under them (to an amount not exceeding $300 in any one case) are good against debts arising out of, or founded on contracts only. Costs made by parties to a suit, are due from them to the officers of the court by reason of an implied promise to pay them, but costs which are made by one party, and recoverable by him of his adversary under a judgment therefor, are not due from the latter by reason of any such promise. They are not a debt arising out of or founded on contract; and property otherwise liable therefor, may not be exempted from execution and sale as against a debt of this kind.

Bankruptcy—Judgment of State Court against Assignee.—*In re* Central Bank of Brooklyn, United States District Court, Eastern District of New York, Benedict, J. [7 Chi. Leg. News, 371.] A judgment of a state court rendered in an action to which the assignee was a party, directing the payment of a certain sum out of the assets of the bankrupt, affords no legal ground to authorize the bankrupt court to countersign a check to enable the plaintiff to obtain such sum.

THE MICHIGAN LAWYER.*

Liability of Husband for Purchases made by Wife.—William B. Clark *et al.* v. Isaac Cox. Error to Kalamazoo Circuit. Opinion by Cooley, J. [1 Mich. Lawyer, 14.] This case involves questions of the right and authority of a married woman to bind her husband by purchases made in his name, without his knowledge or express assent. Defendant was married in September, 1871. He had a dwelling-house where he had before kept house, and to this he took his wife, his former housekeeper remaining with them. He supplied his wife before the marriage with a small amount of money for clothing and jewelry, and did the same afterwards, refusing no request. In the latter part of November, the wife went to the store of plaintiffs and purchased goods in the name of defendant to the amount of $200. Almost all the articles in this purchase were suitable for female apparel. Defendant was not in the habit of buying goods on credit, nor was he a customer at this store; but when solicited some years before to trade there, had declared his intention not to do so. When this purchase was made no enquiry was made by plaintiffs except as to the defendant's responsibility. It was shown that defendant was worth about $20,000, and had been a farmer and accustomed to live with economy, and his wife had earned her own support as a milliner. The defence was that the wife's necessaries were fully supplied, and that the use of his credit by her was unauthorized, and that defendant was therefore not liable, The plaintiffs offered to show a custom in the community for the wife to purchase articles of the nature of these included in this purchase. This was excluded as immaterial. *Held*, that if this was error, it was cured by the circuit judge subsequently in his charge recognizing a general custom to that effect, under limitations making the rule as laid down as favorable to plaintiffs as they are entitled to claim.

Defendant was permitted against objection to show that of his property, about $4,000 was in his homestead; that his whole income was only about $700 a year, from which he paid his taxes; that his health was poor and he could not labor at all; that his wife made other considerable purchases of clothing at other stores on his credit at about the same time with this purchase, and soon after left him; and that the provision he made for his family was similar to that made by his friends and family associates for theirs. The defendant recovered a verdict. *Held*, 1. That the evidence as to plaintiff's income, his family condition, and the manner of life among his friends and intimate associates was competent; that the question what is needful and proper to be supplied as clothing to one's family can not be determined on a consideration solely of the amount of his property; that there can be no absolute standard of reasonable expenditure in these cases; that the income, and the capacity to earn and produce one, is the most important fact for consideration, and should be treated as the real measure of one's estate; that the style of living and expenditures in the circle to which the husband introduces his wife, and where he expects her to find her intimates and associates, is important; that it is a reasonable presumption that both parties expect she will conform to the habits and usage of that circle, and their habits of living and expenditures may fairly be taken as a standard by which to judge of those by the wife, when apparently he has left her to make her own purchases. 2. That the presumption of authority to the wife, to make purchases on credit in the name of the husband, goes no farther than this, that if the husband does not himself procure her the necessary articles suitable to her and his condition, or furnish her with money to procure them for herself, it is presumed he authorizes her to purchase them on credit, and this presumption is rebutted by his purchasing them himself or giving her money for the purpose. 3 That the articles purchased, though such as under different circumstances might have been necessaries, were not under the actual circumstances of this case to be regarded as necessaries. 4. That there was here no express authority to make the purchase, and no implied authority arising from previous dealings, and any that might spring from the husband's neglect of duty in furnishing a reasonable support is disproved; and that therefore the defendant was not liable. 5. That the evidence of purchases made by the wife, of other dealers at about the same time, was immaterial and incompetent, but that it could not have injured the plaintiffs, as no attempt was made to disprove the *prima facie* case made out for the defendant, and upon that case his right to the verdict was unquestionable.

Judgment affirmed, with costs.

*Detroit: Richmond, Backus & Co. This publication, edited by Hon. Hoyt Post, the official reporter of the Supreme Court of Michigan, does not give the opinions in full, but condensed as we now print them.

AMERICAN LAW TIMES REPORTS FOR AUGUST.*

Testimentary Capacity.—Tawney v. Long, Supreme Court of Pennsylvania. Opinion by Gordon, J. [2 Am. L. T. Rep. (N. S.) 341.] 1. A disposing mind and memory exists, if at the time of making a will the testator has a full and intelligent knowledge and understanding of the act he is engaged in, of the property he possesses, an intelligent perception of the disposition he desires to make, and the persons he wishes to be his beneficiaries. Per Fisher, P. J. 2. Although the general capacity of a testator may be unimpeached, if the will is the direct result of partial insanity or monomania without which the will would have been different, it cannot be sustained. Ib 3. Importunate persuasion from which a delicate mind would shrink, will not invalidate a devise. 4. Undue influence, to affect a will, must be such as to subjugate the mind of the testator to the will of the person operating upon it. 5. To establish undue influence there must be proof of fraud, threats, or misrepresentations, undue flattery, or physical or moral coercion, so as to destroy the testator's free agency operating as a present constraint at the making of the will. 6. Neither general bad treatment nor general kindness is evidence of undue influence, unless shown to be part of a crafty arrangement to procure the will. 7. Evidence in this case insufficient to show undue influence.

Right of Witness to Decline to Answer where answer will Criminate Him—Duelling.—Cullen v. The Commonwealth. Court of Appeals of Virginia. Opinion by Boulden, J. [2 Am. L. T. Rep. (N. S.) 349.] 1. By the 8th section of the Bill of Rights of Virginia, a person is not only secured against giving evidence against himself on his own trial, but he can not be required on the trial of another, to testify, if his evidence will tend to criminate himself. 2. Even if a person might be required to give evidence on the trial of another which might tend to criminate himself, if the statute afforded him a complete indemnity, by discharging him from all prosecution for the offence (of which *quære?*), the act of October 7, 1870, amending § 1, ch. 12, of the Code of 1860, does not afford that indemnity; and, therefore, in requiring any person engaged in a duel to testify against another prosecuted for having fought, etc., such duel, is unconstitutional. 3. The fact that the witness has testified before the coroner, and stated the facts, does not deprive him of his privilege, and that having been done without being advised of his privilege it is not a waiver of it by him. 4. Under the principles of the common law and the statutes against duelling, it may well be apprehended that the surgeon of a party to a duel would be regarded in law as being concerned in, or as aiding and abetting the duel.

Railroad—Negligence—Duty of Persons in Approaching Crossing—Presumptions in Respect to Proper Care.—Pennsylvania Railroad Co. v. Weber, Supreme Court of Pennsylvania, opinion by Williams, J. [2 Am. L. T. Rep. (N. S.) 864.] 1. Weber, driving a horse and light wagon over a railroad on the crossing of a country road, was killed by a locomotive moving on the railroad. There was no express testimony as to whether he stopped and looked and listened before going on the railroad. *Held*, that the question of his negligence was for the jury. 2. It is the duty of a traveller to stop and look and listen before crossing a railroad; not so doing, is negligence in itself. 3. The presumption, in the absence of other evidence, is, that the traveller stops and looks and listens before crossing a railroad 4. In an action against a railroad company for injuring such traveller, the burden is on the defendants to disprove care, unless the plaintiff's own evidence shows contributory negligence. 5. Although from the uncontradicted evidence in this case it might have been inferred that, if the traveller had stopped, and looked and listened, he would have seen the approaching train, it was for the jury to determine the fact.

Municipal Corporation—Damages for Changing Grade of Street.—City of Pontiac v. Carter. Supreme Court of Michigan, opinion by Cooley, J. [2 Am. L. T. Rep. (N. S.) 376.] Damages will not be given for the injury to adjacent property, caused by changing the grade of a street when the change is lawfully made by the proper authority.

* Cambridge, Mass.: H. O. Houghton & Co.

Notes and Queries.

JUDICIAL KNOWLEDGE—REPLY TO W. P. W.

EDITORS CENTRAL LAW JOURNAL:—The criticism in your last number by W. P. W. of Kansas City, upon an attempt to explain an inconsistency in the application of an assumed rule, that courts will take judicial notice of the seal and signature of county officers, was read by me with great pleasure. The letter which I attempted to answer questioned the propriety of admitting in evidence the certificate of the clerk to a transcript of a proceeding of the county court, without proof of seal and signature, while in the suit upon a county bond, sealed and executed by the same clerk, proof was required. If the court takes judicial notice of the seal and signature of county clerks, why not in both cases? I attempted to answer the question, but only succeeded in giving some reasons why, in an action upon the bond, and under a plea of *non est factum*, evidence of its execution must be given, although a certificate to a transcript is received without evidence. Still, *under the rule as given*, the difference was not satisfactorily accounted for. The real answer should have been either that there is no such difference, or no such rule, and W. P. W. has hit the nail on the head. If there be this difference there may be a rule, but not the one given; it is less broad, and the general criticism of the writer upon the want of precision and limitation in rules, as often stated, is just.

What, then, is the true rule? What language can be used that shall include all cases where courts shall take cognisance of the signatures and seals of local officers, and exclude those where evidence may be required? Can one be given broader than this, that courts will take judicial notice of the seal and signature, or the signature alone in official certificates authorized by law, and used as evidence when made by inferior officers living within their jurisdiction? This will cover certificates of clerks of courts to transcripts from the records; of justices of the peace, from their dockets; of county recorders in regard to copies of recorded deeds, of the proper officers certifying to depositions. But this does not include all cases, for the seal and signature to a writ will also be noticed; hence another, and perhaps still other, rules will be necessary. Or is there some broad rule or principle that shall cover all cases, and still be so definite as to be practical?

The Supreme Court of California (Wetherbee v. Dunn, 32 Cal. 106), in excusing evidence as to who was tax collector at a particular time, remarks, "We think the courts ought at least to go so far as to take notice as to who fill the various offices within their jurisdiction, and *the genuineness of their signatures*." The tax collector's deed seems to have been admitted in evidence without proof of its execution, which the court justifies under the rule, although another reason is also given, to-wit.: that it had been properly acknowledged. According to this case, the rule as originally given, is correct, and the holder of the county bond would not be required to prove its execution, and perhaps other appellate courts will take the same view, although we do not see how they can take the issue from the jury, or rather refuse to permit an issue of fact to be made as to the execution of the instrument.

In endeavoring to classify the matters which the courts would judicially know, I became painfully conscious of the uncertainty that exists in some cases, and I am gratified to see a disposition to discuss the rules as generally received. Nothing is more unsafe then to generalize from a few instances. It is the chief source of our errors upon all subjects, and it is better to confine a given ruling to the particular case, then to make haste to find a general rule, to which we may be compelled to make so many exceptions as to destroy the rule itself.

I do not know, however, as it will do to say that "a rule, properly so called, has no exceptions." I should fear the fate of many cherished maxims And in most rules, some things must be understood, both in their scope and application. They may not be complete descriptions, including all things and excluding all things, like a *perfect* definition, but may be rather instruments of classification, by means of which we can arrange our ideas upon different subjects for convenient use. This is true of rules of pleading which can not always have a mathematical precision and certainty, but must be explained and applied, to be understood. A rule as a statement of a truth may be inflexible, as a law of action it may be a very good rule, and still have exceptions. For instance, it was said to be a rule of common law pleading, that facts should be stated with certainty. And yet how many the exceptions. Also in criminal pleadings, that the indictment (count) should not be double, and yet we have burglary and larceny in one count, also conspiracy and the overt act. The rule as a law of action is modified or abandoned under peculiar circumstances. But it is in the other sense of the term *rule*, doubtless, that your correspondent would say that the bare admission of an exception disproves the rule. I would not quarrel with him upon that, but its adoption would lead to a severe overhauling of our legal maxims, and perhaps to the *quashing* of most of them. B.

ST. LOUIS, August 10, 1873.

—SENTENCE ON A DOG.—The following is the copy of the judgment rendered in the St. Louis Police Court, recently, in the case of Herman Eppinghaus, accused of keeping a vicious dog: To John R. Slevin, City Marshal of the city of St. Louis, greeting: Whereas the city of St. Louis has obtained judgment against the defendant in the above-entitled cause, part of said judgment being the slaughter or execution of a certain dog, in complaint named. These are therefore to command you to cause said dog to be slain in pursuance to said order of the court, it being a part of the judgment, and collect from the defendant the sum of five dollars for your services in executing this order Given under my hand at the Police Court of the city of St. Louis, this 16th day of July, 1875. J. W. McBride, clerk of the police court.

Legal News and Notes.

—A SUIT has been brought in the Supreme Court of New York, by a New Jersey husband against a woman in New York city, for fifty thousand dollars damages, for enticing away his wife. Such suits are generally brought against men; and as it will be man against woman in this case, and not man against man, there seems not much chance of his getting a heavy verdict.

—THE Mutual Life Insurance Company of New York has done a wise thing, and one which it deserves much credit in issuing two handsome phamphlets, one consisting of "Plain Directions for Accidents, Emergencies and Poisons," and the other consisting of "Plain Directions for the Care of the Sick, and Recipes for Sick People," for gratuitous distribution amongst its policy-holders. The former contains 126, and the latter 64 printed pages. Each has an index.

—A CALIFORNIA judge has decided that the wife of a man in prison for life is a widow in law. Upon application of Mrs. King for a distribution of her father's estate on the ground that she was a widow, her husband being in Sing Sing for life. Judge Myrick held that she no longer owed allegiance to King, as his wife; that he was dead in law; that he had no civil rights; if he had an estate it was subject to administration; if he had children he has lost their guardianship, and they owe no duty to him. The judge decreed a distribution of her father's estate, and very wisely, too.—[*The Legal Chronicle.*

—THE amenities of the bar seem to be without restriction. A barrister is in no fear of being threatened with either arrest in, or expulsion from, a court in which he is conducting a client's cause, and at the most the presiding judge will go no further than threaten to stop the cause. A somewhat painful exhibition has recently been enacted at the Salford Hundred Court of Record, when Mr. Kay, Q. C., was presiding. The action was for damages for alleged slander and assault, in which a number of witnesses were called on either side, and in several cases during the examination and cross-examination of these, counsel (solicitors, we believe, have no right of audience in the court), interrupted each other so immoderately and frequently that it probably left the impression on the minds of many, that neither the one nor the other was particularly skilled in his professional duties. At length the learned judge became indignant at the exhibition, and exclaimed, "It is perfectly digusting trying a case in this disgraceful manner. I will give you one more chance. If this does not stop I will stop the case and put it at the end of the list." We are tempted to remark that talking is not the only province of a barrister, but tact and judgment, as well as a knowledge of the law.—[*Solicitor's Journal*

A WRITER in the Southern Law Review attacks with considerable vigor the judicial habit of writing long opinions. Such a habit is unquestionably a serious evil, not only because it increases the reports, and buries the law beneath a mass of verbiage, but also because it leads lawyers to rely upon the syllabi of the reporters, without reading the judgments of the court. To such an extent had the habit gone in New Hampshire, that one case in the last volume of reports from that state occupied over 270 pages. The legislature found it necessary to intervene and to provide that each judge should state briefly his reasons for his judgment. As a rule, a long opinion is a loose and slovenly opinion, made up of quotations from other opinions, bad syntax and worse logic. Nine times out of ten, when a judge indulges in a prolix opinion, it is only because he is either a loose thinker, or but vaguely comprehends his subject. We must heartily commend to the judges the article of which we have spoken, in the hope that its arguments, and the illustrations which it gives from French decisions, may induce them to stay their pens occasionally. It occurs to us that in form and length, if not in merit, the best models of judicial opinions to be found in this country, are the opinions of the Supreme Court of Louisiana.—[*The Albany Law Journal.*

—NEW JERSEY EXECUTIONS.—The treatment of prisoners condemned to the gallows is more humane in the United States than in England, to judge by the account given in the American papers of the hanging of John Hughes at Newton, New Jersey, on the 2d instant, for the murder of his wife. Hughes, although his domestic affections were weak, had a remarkable fondness for ice-cream and cigars. Everybody who visited him in his cell was expected to bring him a supply of the latter article, while the ladies of Newton, it is said "were profuse in their contributions of flowers and delicacies." A pleasing picture is drawn by a reporter of the appearance of Hughes in his cell the day before he was executed. Hughes, who had but one eye, and whose charms were certainly not of a personal nature, was smoking a cigar. He was dressed neatly, in "light pants, a clean shirt and collar, black tie and vest, and no coat." A stand in the cell was covered with luxuries, none of which, however, he had tasted, with the exception of a dish of ice cream and strawberries. He was very much annoyed because a pair of slippers, kindly brought by the sheriff for him to wear at the execution, were rather too large for his feet "They are too big," he exclaimed indignantly, "and won't do at all." A few moments before he was taken out to be hanged, he asked for some more ice cream, which was supplied to him; he then lighted a cigar, which he continued to smoke until it was extinguished by the black cap. This interesting criminal was, it is said, born in Ireland. It is doubtful whether his last moments would have been so comfortably spent in his native land.—[*Irish Law Times.*

—MR. THOMAS G. SHEARMAN, one of the authors of that useful work Shearman & Redfield on Negligence, and of counsel for Mr. Beecher in the late scandal trial, has either taken out his handkerchief in a Plmyouth church prayer-meeting, or done something else that has given his enemies an opportunity to dilate on his alleged lachrymose tendencies. We know that there have been great floods in England, as well as in America, caused, as Prof. Tice, of St. Louis, plausibly argues, by the Venusian equinox. (Our readers must not get confused here, and fall into the error of supposing that the said equinox produced the Tilton-Beecher trial). This would not, however, be sufficient to account for the devastating flood which lately swept over London, submerging even the pinnacle of Saint Paul's steeple. The attempt of the New York Daily Graphic, to account for it by connecting it with Mr. Shearman's arrival in London, must therefore be characterized as a base slander. That journal unblushingly published and circulated the following dispatches:

LONDON ENTIRELY SUBMERGED—FEARFUL LOSS OF PROPERTY AND LIFE.

[Special Cable Dispatches to the Daily Graphic.]

LONDON, July 23.—A large Beecher mass meeting will be held here to-morrow. Doctor Kenealy will preside, and Mr. Thomas G. Shearman will speak. Fully twenty thousand people will attend. The large tank formerly occupied by Tozer, the lately deceased crocodile, has been brought up from the Brighton Aquarium for Mr. Shearman to weep into.

LONDON, July 24.—While Mr. Thomas G. Shearman was addressing the meeting at the City Temple yesterday, a great freshet took place in the Thames. A number of bridges were swept away and many lives lost. The City Temple stands on an eminence beside the Thames.

LATER.

The greatest consternation prevails. The police have been called out. Mr. Thomas G. Shearman is still weeping The water stands three feet above high water mark. It is now known that 470 persons have been drowned. The city is filled with the wildest excitement.

STILL LATER.

Mr. Shearman still weeping. The Thames embankment has given way, and the whole lower part of the city is under water. I am in a boat looking down into the Temple. My God, Mr. Shearman is still weeping.

LATER YET.

All is lost. St. Paul's steeple has just disappeared. I am in a waste of waters. I can—(Here the dispatches abruptly end. The gravest fears are entertained for the safety of our correspondent.)

—DISCREPANCIES IN LAW BOOKS.—A correspondent in Tennessee calls our attention to the following discrepancies in three local works: Counting only to and including the first of Coldwell's Reports, through which all three have gone, a comparison of Heiskell's and King's Digests, and Gilbert's Index to the Tennessee Reports on the single title of "Bills of Discovery," develops the following results:

Heiskell	cites	6	cases.		
King	"	4	"		
The Index	"	8	"		
Heiskell	cites	4	cases	not in	King.
"	"	4	"	"	" Index.
King	"	2	"	"	" Heiskell.
Index	"	6	"	"	" "
"	"	4	"	"	" King.

Only *two* cases are cited by all three of the books. See Heisk. Dig. p. 538; 3 King Dig., p. 443; Gilbert's Index, p. 51. The count is made only under this one title; and doubtless the cases are to be found under some heading not suggesting itself to one examining the law as to bills of discovery. "Why," enquires our correspondent, "should such discrepancies occur in the most useful of our law books?" The answer would necessarily seem to be, that such discrepancies argue an imperfection in all of the works named. Manifestly *all* the decisions under such a title as Bill of Discovery in a digest, should be grouped under that title, and not scattered among other titles. Cross references should then be made to them from every other title under which the reader might be supposed to look for them. The successful accomplishment of this is the highest merit of a digest. The failure to accomplish it is an imperfection for which nothing can atone. If a digest is perfect in this respect it will, at least, serve as a useful index, which is the main office of a digest, although its abstracts of the cases may be imperfect,